



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-00476
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: John C. Lynch, Esq., Department Counsel  
For Applicant: *Pro se*

02/16/2024

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**Decision**

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BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse security concerns triggered his marijuana use and purchase. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 5, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The CAS acted under Executive Order (EO) 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 implemented by the DOD on June 8, 2017.

In Applicant's June 13, 2023 response to the SOR (Answer), he admitted, with explanation, SOR ¶¶ 1.a. and 1.b. He provided additional information, and he did not attach any documentary evidence. He requested a decision by a Defense Office of

Hearings and Appeals (DOHA) administrative judge based upon the written record in lieu of a hearing. (Answer)

On November 27, 2023, Department Counsel submitted a file of relevant material (FORM) and provided a complete copy to Applicant. Department Counsel's FORM includes Government Exhibits (GE) 1 through 5. In the FORM, Department Counsel provided Applicant notice that failure to respond to the FORM may be considered a waiver of any objections to the admissibility of GE 1 through 5.

On December 4, 2023, Applicant received the FORM and its attachments. In an undated, two-page response to the FORM (FORM Response), Applicant provided additional information about his marijuana use and purchase. He did not attach any documentary evidence nor raise any objections to the admissibility of any of the FORM exhibits. This case was assigned to me on February 1, 2024. GE 1 through 5 are admitted without objection.

### **Findings of Fact**

Applicant is 54 years old. He graduated high school in 1988, and he earned a bachelor's degree in 1992. From 1993 to 1996, he served on active duty in the U.S. Navy, from which he received an honorable discharge. Applicant held a Top Secret clearance while serving in the Navy. Applicant was married to his first wife from February 2004 to January 2016. He married his second wife in February 2020, and they have been separated since May 2022. He has an 18-year-old child from his first marriage. Since September 2022, he has been employed by a DOD contractor. (GE 3; Answer)

On August 18, 2022, Applicant completed and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23 – Illegal Use of Drugs or Drug Activity, he reported no illegal drug use or purchases within the previous seven years. He reported no drug arrests, drug charges, or felony charges in his e-QIP. (GE 3)

Criminal records from the Federal Bureau of Investigation indicate that Applicant was charged with illegal possession of controlled substance without a prescription, a felony, in October 2000. Applicant claimed that this charge was later dismissed; however, there is no documentary evidence as to the disposition of the charge. (GE 4; GE 5)

On September 26, 2022, Applicant was interviewed by an authorized investigator on behalf of the Office of Personnel Management. During the interview, he initially denied any drug arrests or charges. After he was confronted by the investigator, Applicant admitted a prior drug arrest in 2000; however, he did not remember the details of the charged offense. He claimed the charge was later dismissed. (GE 5)

During the OPM interview, Applicant provided additional information about his history of marijuana use. He first used marijuana in 1988 until 2004. Although he did not provide detailed information about the frequency of his marijuana use, he reported that

he used marijuana three times a week around the time of his 2000 drug offense. In March 2022, he suffered a traumatic brain injury (TBI) and other injuries. He subsequently obtained a medical marijuana card for pain from these injuries. He started using marijuana in June 2022 because his prescription pain medication was not effectively managing his pain. He typically ingested marijuana in edibles on a daily basis. He used marijuana daily from June 7, 2022 until early September 2022. He explained that he did not disclose his marijuana use on his e-QIP because he did not understand that his marijuana use violated Federal laws. He expressed his intent to use marijuana, with his medical marijuana card, in the future if permitted by his employer. (GE 5)

In his May 18, 2023 response to DOHA interrogatories, Applicant confirmed that the OPM summary reflected his admissions during the September 16, 2022 interview. He listed his marijuana use as 2019 to 2022; however, he did not specify the frequency of his use. At the time he completed the interrogatories, he associated with a parent and his first wife, who continued to use marijuana. He listed that he last used marijuana in “late 2022.” (GE 5)

In his June 13, 2023 Answer, Applicant admitted using marijuana from June 2022 until September 2022 (SOR ¶ 1.a.). He further admitted that he had purchased marijuana from state-licensed dispensaries from June 2022 until August 29, 2022 (SOR ¶ 1.b.). (Answer)

In his FORM Response, Applicant explained that he had obtained a medical marijuana card to manage pain from a traumatic brain injury or other injuries that occurred in May 2022. A physician identified medical marijuana as a potential substance to prevent future strokes and seizures. Applicant admitted that he used marijuana from about 1988 to 1993 and again between 1996 and 2004. He then used marijuana occasionally, with his then fiancée beginning in 2019. At the time, his fiancée had a medical marijuana card, but Applicant was illegally using marijuana without a medical marijuana card. In his FORM Response, Applicant explained that he no longer associates with either ex-spouse, who had used marijuana in his presence, and that his father no longer uses marijuana. As to whether he intended to use marijuana in the future, he responded that he did not “anticipate to have any plans to use marijuana.” (FORM Response)

## **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, 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 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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Section 7 of EO 10865 provides that adverse 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 for drug involvement 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

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

Marijuana is a Schedule I controlled substance under Federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security eligibility determinations.

Moreover, on December 21, 2021, the current DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur.

Applicant's illegal use, possession, and purchase of marijuana spanned from about 1993 to 1996, 1996 to 2004, and from 2019 until September 2022. He admitted daily use of marijuana between June 2022 and September 2022. AG ¶¶ 25(a) and 25(c) apply.

The SOR did not allege that Applicant expressed an intent to use marijuana in the future or failed to convincingly commit to discontinue his marijuana use. Furthermore, the Government did not amend the SOR to raise such disqualifying conduct. Therefore, I am not permitted to consider or apply AG ¶ 25(g).

Conditions that could mitigate the drug involvement security concerns are provided under AG ¶ 26. The following 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 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 bears the burden of production and persuasion in mitigation. The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *[Department of the Navy v. Egan, 484 U.S. 518, 528 (1988)]*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). (ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013))

Applicant used marijuana from about 1993 to 1996, from 1996 to 2004, and between 2019 and September 2022. He also was charged with a felony drug offense in 2000. During his security interview, Applicant reported that he was using marijuana as frequently as three times a week around the time of his 2000 arrest. He also initially denied any drug arrests, despite the 2000 felony arrest and charge. Applicant did not possess a medical marijuana card when he used marijuana with his fiancée beginning in 2019. Any use by Applicant prior to obtaining a medical marijuana card in June 2022 violated both Federal and state drug laws. Applicant has not adequately explained why he did not report his pre-injury marijuana use (with his ex-wife between 2019 and March 2022) or his felony drug arrest in his e-QIP.

From June 7, 2022 until at least September 2022, Applicant used marijuana on a daily basis, while he held a medical marijuana card. During his Answer, Applicant explained that he did not understand that his marijuana use was prohibited under Federal law. His ignorance or uncertainty about whether marijuana was prohibited under Federal law does not excuse his conduct. See ISCR Case No. 19-00540 at 3 (App. Bd. Dec. 13, 2019)(citing *Rhode Island v. Massachusetts*, 45 U.S. 591, 613 (1846)).

Applicant's disclosures about his drug involvement and associations have been inconsistent throughout the security clearance investigation and adjudication. In his May 2023 response to DOHA interrogatories, he stated that his marijuana use continued until "late 2022"; however, in his June 2023 Answer, he stated that his use ended following his September 2022 OPM interview. As of his May 2023 response to interrogatories, Applicant still associated with his father, a marijuana user, but, as of his FORM response, his father ceased his marijuana use as of September 2022.

In his response to DOHA interrogatories, Applicant stated that he did not intend to use marijuana in the future. In his FORM Response, Applicant stated that he did not "anticipate to have any plans to use marijuana." Applicant has not clearly and convincingly expressed his intent to abstain from marijuana use. AG ¶ 26(b)(3) does not apply.

I have considered the length, frequency, and recency of Applicant's marijuana use. I have also considered that his marijuana use persisted after he submitted his e-QIP and began his employment with a DOD contractor, and potentially after his September 2022 OPM interview. Applicant's marijuana use to alleviate pain and reduce the risk of stroke and seizure still violates Federal law and does not mitigate the triggered security concerns. Applicant's recreational use of marijuana prior to his injury and his inconsistent statements about his drug use and associations undercut his credibility, reliability, and good judgment. Taking the record evidence in its entirety, Applicant has not mitigated the drug involvement and substance misuse security concerns.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust 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 position of trust 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 factors in AG ¶ 2(d) in this whole-person analysis.

Applicant's lengthy history of marijuana use predates his March 2022 injury. He failed to disclose his previous drug arrest and his pre-injury marijuana use on his e-QIP, and he omitted his marijuana use between 2019 and June 2022 during his OPM interview. His inconsistent statements – about his marijuana use and associations – cast doubts on his trustworthiness, reliability, and judgment. In the future, with the passage of time and an established pattern of abstinence, he may sufficiently mitigate those security concerns. At present, Applicant did not mitigate the drug involvement security concerns. Eligibility for access to classified information is denied.

### **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 by the record in this case, I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Eric H. Borgstrom  
Administrative Judge