



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



In the matter of: )  
)  
) ISCR Case No. 23-01096  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Troy L. Nussbaum, Esq., Department Counsel  
William H. Miller, Esq., Department Counsel  
For Applicant: Anthony J. Kuhn, Esq.

02/13/2024

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**Decision**

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BORGSTROM, Eric H., Administrative Judge

Applicant illegally used marijuana from mid-2014 until October 2022, and he repeatedly expressed his intent to use marijuana in the future. He has only recently ceased his marijuana use and expressed his intent to abstain from marijuana use in the future. His candor does not overcome the concerns raised by his repeated violation of Federal and state drug laws. He did not mitigate the drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 15, 2023, the Defense Counterintelligence and Security Agency 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 July 10, 2023 response to the SOR (Answer), he admitted with explanations SOR ¶¶ 1.a., 1.c., and 1.d., and he admitted in part and denied in part the allegation in SOR ¶ 1.b. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On August 9, 2023, the Government was ready to proceed to hearing. I was assigned this case on August 11, 2023. On August 29, 2023, DOHA issued a Notice of Hearing, scheduling a hearing by video teleconference for September 27, 2023. The hearing proceeded as scheduled. The Government proffered two exhibits, which I admitted as Government Exhibits (GE) 1 and 2 without objection. Applicant testified and three witnesses testified. Applicant proffered 16 exhibits, which I admitted as Applicant Exhibits (AE) A through P. DOHA received the hearing transcript (Tr.) on October 11, 2023. The record closed on October 11, 2023.

### **Findings of Fact**

Applicant is 26 years old. He graduated from high school in May 2015. From February 2016 to June 2022, he attended college, and he earned a bachelor's degree. Since September 2022, he has been employed as a software engineer with a DOD contractor. (GE 1; AE G-H; Tr. 26, 43, 46-47)

The SOR alleges security concerns arising from Applicant's admitted use of marijuana (SOR ¶ 1.a.), psilocybin mushrooms (SOR ¶ 1.c.), and a prescription drug without a prescription (SOR ¶ 1.d.). The SOR also alleges that Applicant repeatedly expressed his intent to use marijuana in the future (SOR ¶ 1.b.). The record evidence reflects that Applicant's admissions about the span and frequency of his drug involvement have shifted during the security clearance investigation and adjudication.

On September 26, 2022, Applicant certified and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23 - Illegal Use of Drugs or Controlled Substances, Applicant reported that he had used marijuana between July 2014 and April 2022 (SOR ¶ 1.a.). He stated, "Recreational use of marijuana via smoking, vaping, and ingestion." He also reported that he intended to use marijuana in the future (SOR ¶ 1.b.); and stated, "Considering obtaining a medical card for using THC to help with anxiety now that I live in a state where recreational use is illegal." In his e-QIP, Applicant did not specify the frequency of his use or identify any periods between July 2014 and April 2022 when he did not use marijuana. He did not report any use of psilocybin mushrooms or his misuse of a prescription drug (Xanax). (GE 1)

On January 6, 2023, Applicant was interviewed by an authorized investigator on behalf of the Office of Personnel Management (OPM). Applicant admitted using marijuana approximately five to seven times a week from July 2014 to the fall of 2020. He typically smoked, vaped, or ingested the marijuana. He did not use marijuana between November 2020 and October 2022 or November 2022, when he most recently used marijuana with his girlfriend. Applicant's girlfriend, with whom he resided, had a medical marijuana card, purchased marijuana from a dispensary, and used marijuana daily. In October 2022 or November 2022, he twice used marijuana with his girlfriend. (GE 2)

During his January 2023 security interview, Applicant stated that he intended to obtain a medical marijuana card. He enjoyed smoking marijuana and planned to continue using marijuana after obtaining a security clearance (SOR ¶ 1.b.). When advised by the OPM investigator that marijuana use was prohibited by Federal law, Applicant responded that he would need reminders to not use marijuana. He then stated that he intended to obtain a medical marijuana card and continue to use marijuana even if it was illegal under Federal law, but he stated that he would cease marijuana use if required to do so by his employer. (GE 2)

During his January 2023 security interview, Applicant admitted that he ingested psilocybin mushrooms in 2016 (SOR ¶ 1.c.). He explained that he obtained the mushrooms from a friend who cultivated such mushrooms. Applicant experienced hallucinations after he ingested the mushrooms. He also admitted that he used Xanax, a prescription medication, without a prescription in 2015 or 2016 (SOR ¶ 1.d.). (GE 2)

On May 29, 2023, Applicant adopted the summary of the January 2023 OPM interview without any revisions or corrections as to the span or frequency of his marijuana use. As for his intent to use marijuana in the future, Applicant stated:

During the investigation, upon being informed that receiving a medical card for marijuana use was illegal federally, I was somewhat hesitant with this information, however marijuana is not a part of my life anymore, and I have no real desire to obtain a medical card or to use it again. I want to clarify this because me [sic] response to that during the interview doesn't really reflect my thoughts anymore. (GE 2)

In addition to adopting the January 2023 OPM interview, Applicant, in his own words, outlined the span and frequency of his marijuana use. He listed "Marijuana (THC)" between the summer of 2015 and October 2022, and he stated the frequency as "multiple times a week in 2019, once or twice a year otherwise." As of May 29, 2023, Applicant continued to reside with his girlfriend, who used marijuana weekly and used in Applicant's presence on a monthly basis. Applicant attached his employer's policy prohibiting the use of illegal drugs, including marijuana, as defined under Federal and state laws. Medical marijuana use is explicitly prohibited under the employer's policy. The policy specifies that violation of this anti-drug policy may result in termination. (GE 2)

In his July 10, 2023 Answer, Applicant provided additional, yet inconsistent, information about the frequency and span of his marijuana use:

The bulk of Respondent's past marijuana use occurred almost exclusively during his earlier college years. As his studies progressed, he disassociated himself from the individuals he used marijuana with. Beginning in 2020, his marijuana use dropped to as little as once or twice annually. Respondent's last use was an isolated incident in October 2022 in which he vaped from a marijuana vape pen.

On July 28, 2023, Applicant participated in a clinical interview with a psychologist. Applicant confirmed that he continued to reside with his girlfriend, who continued to use

marijuana. He reported that he first used marijuana in 2014 or 2015, and then only used marijuana "a couple of times" between 2014 and 2019. Beginning in 2019, he used marijuana by vape pen or edibles two or more times a week. His marijuana use tapered off in 2020, and he used marijuana about three times between 2020 and 2022. During the clinical interview, he reported that he last used marijuana in "around October 2022." The psychologist concluded that Applicant did not meet the criteria for any mental health or substance use disorder. (AE C)

At the hearing, Applicant testified about his drug involvement and his intent to use illegal drugs in the future. He testified that he used marijuana a "few times total" between 2014 and 2019. From 2019 until early 2020, he used marijuana a couple times a week. He explained that he attended fewer social gatherings during the COVID pandemic and his marijuana use decreased to twice annually between early 2020 and October 2022. He admitted that his last use of marijuana occurred about two weeks after he started working for a DOD contractor. He always purchased marijuana from state-licensed dispensaries. Applicant also confirmed his one-time use of psilocybin mushrooms in 2016 and his one-time recreational use of Xanax, without a prescription, in 2015 or 2016. (Tr. 20-24, 30, 33, 64)

Applicant explained that he had believed that his recreational marijuana use was legal at the time of his conduct. He testified that, during the January 2023 OPM interview, he learned that his marijuana use violated Federal law, but he explained that he did not fully grasp the concern until he conducted his own research in May 2023. He confirmed that he also learned that his employer had a policy prohibiting its employees from using illegal drugs, to include marijuana. He also expressed his intent not to use any illegal drugs while holding a security clearance. (Tr. 24-27)

During cross-examination, Applicant testified that he first used marijuana in the summer of 2014 and then used again approximately two or three times between 2017 and 2019. He used marijuana twice a week between 2019 and early 2020, and then used marijuana twice a year from early 2020 until October 2022. When confronted with the frequency of his use detailed during his January 2023 OPM interview and adopted in his May 2023 interrogatories, he disputed the frequency of his marijuana use as detailed in the OPM interview summary. He claimed that he did not tell the OPM investigator that he had used marijuana five to seven times a week. He admitted that he had not spent adequate time and focus to accurately report his marijuana use in his e-QIP, during his OPM interview, and in his response to the interrogatories. Notwithstanding his adoption of the frequency of his marijuana use in his response to the interrogatories, he disputed that frequency in the OPM summary at the hearing. He did not dispute that he stated in his e-QIP and during his security interview that he intended to obtain a medical marijuana card and that he intended, at the time, to use marijuana in the future. As for his October 2022 use of marijuana, Applicant testified that he suggested to his girlfriend that they use marijuana together on that occasion. (Tr. 29, 54-61, 67, 81, 83)

At the hearing, Applicant initially stated that he used marijuana "and not THC." He was later questioned why he listed his marijuana use under "Illegal Use of Drugs" in the e-QIP if he believed his marijuana use was legal. He explained that he saw "THC" within

the question and decided to report his marijuana use. He could not reconcile his earlier testimony wherein he believed marijuana and THC were different substances. (Tr. 74)

Applicant testified that he and his girlfriend have dated for two-and-a-half years, and they have resided together since August 2022. She has a medical marijuana card and uses marijuana once or twice a week, either outside the residence or on the porch. Applicant did not know where she stored the marijuana vape pen within their residence. (Tr. 36, 48-49, 76)

Applicant submitted a statement of intent to abstain from all illegal drug use in the future. He completed a four-hour drug and alcohol awareness class in July 2023. He twice passed drug tests in July and August 2023. Because he moved across the country, he no longer associates with those whom he previously used illegal drugs - with the exception of his live-in girlfriend. Applicant has not informed his facility security officer (FSO) or his supervisor about his marijuana use while an employee with a DOD contractor. (AE D-F, P; Tr. 20, 34, 79-80)

Two of Applicant's co-workers described him as "highly professional," trustworthy, ethical, and reliable. His current roommate, two longtime friends, and his parents also praised Applicant as reliable, trustworthy, and honest. (AE I-O)

### **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 sensitive 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.

On December 21, 2021, the 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 possession and use of marijuana between mid-2014 and October 2022 violated Federal drug laws. His use of marijuana prior to the age of 21 and his use in October 2022 also violated state drug laws. His use of psilocybin mushrooms and misuse of a prescription drug violated state and Federal drug laws. In his e-QIP and during his security interview, he repeatedly expressed his intent to use marijuana in the future. AG ¶¶ 25(a), 25(c), and 25(g) apply.

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's illegal use and purchase of marijuana spanned over eight years. 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)). Moreover, he continued

to use marijuana after he submitted his e-QIP and began working for a DOD contractor, who prohibited any marijuana use. Applicant's most recent use also violated state drug laws and Applicant suggested using marijuana on that occasion. In his e-QIP, Applicant listed his marijuana use as "illegal drug use," which should have sparked some awareness that marijuana use was prohibited by clearance holders. See ISCR Case No. 19-00540 at 3 ("An applicant's use of illegal drugs after having completed a security clearance application or after otherwise having been placed on notice of the incompatibility of drug abuse and clearance eligibility raises questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations.").

Even after he was confronted by the OPM investigator in January 2023 about the illegality of marijuana use under Federal law, Applicant did not recant his expressed intent to use marijuana in the future. Instead, after his receipt of DOHA interrogatories in May 2023, he conducted his own research and expressed his intent to abstain from future illegal drug use. AG ¶ 26(b)(3) applies.

Applicant resides with his girlfriend, who continues to use marijuana, and with whom Applicant used marijuana while employed by a DOD contractor. Applicant's violation of his employer's anti-drug policy is a fire-able offense, and he has not informed his security officer or his supervisor of his violation. The frequency and span of Applicant's marijuana use have decreased as his illegal drug use has adversely impacted his clearance adjudication. While some of the circumstances surrounding Applicant's illegal drug use may have changed due to his relocation across the country and away from the college environment, he resides and closely associates with a regular marijuana user. Moreover, Applicant's previous statements about his future intent to use marijuana do not reflect the maturity and judgment required of one entrusted to safeguard classified information. With a more established pattern of abstinence, Applicant may mitigate the drug involvement and substance abuse concerns, however, he did mitigate those concerns as of the close of the record.

### **Whole-Person Concept**

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

Applicant's character references praised his honesty and reliability. He disclosed his longtime marijuana use and his intent to continue such use. After recognizing the potential adverse impact of his illegal drug use on his clearance adjudication and his employment, he expressed his intent to abstain from future use. 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.

### **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.d.:	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