



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



In the matter of: )  
)  
) ISCR Case No. 23-00646  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Alison P. O’Connell, Esq., Department Counsel  
For Applicant: *Pro Se*

01/04/2024

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**Decision**

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BORGSTROM, Eric H., Administrative Judge:

From 2006 until at least July 2023, Applicant used marijuana, with varying frequency. He repeatedly expressed his intent to continue using marijuana, acknowledging that his possession and use violated Federal drug laws. His expressed intent to discontinue his marijuana use, contingent upon his active possession of a security clearance, does not mitigate the drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On May 22, 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 May 25, 2023 response to the SOR (Answer), he admitted SOR ¶ 1.a. and denied SOR ¶ 1.b. He provided additional information and explanation in his four-page response, 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 July 24, 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 6. 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 6.

On July 26, 2023, Applicant received the FORM and its attachments. He did not submit a response to the FORM within 30 days of receipt or raise any objections to the admissibility of any of the FORM exhibits. This case was assigned to me on December 20, 2023. GE 1 through 6 are admitted without objection.

### **Findings of Fact**

Applicant is 37 years old. He graduated from high school in May 2005, and he earned a bachelor's degree in May 2011. From June 2011 to November 2021, he was employed full time as a sales manager for a private company. He was unemployed from November 2021 to June 2022. Since June 2022, he has been employed as a process engineer with a DOD contractor. (GE 5)

On July 20, 2022, Applicant completed and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23, he admitted that he had used marijuana approximately once or twice a week between April 2021 and July 2022. He also admitted that he intended to use marijuana in the future. He stated, "In my opinion, THC [tetrahydrocannabinol] is a welcome legal alternative to alcohol in my state. I would not use THC if required to maintain a security clearance or for any other job related [sic] reason. If I do not have a reason to abstain from its use, then I foresee myself continuing to use it recreationally." (GE 5)

On September 13, 2022, Applicant was interviewed by an authorized investigator on behalf of the Office of Personnel Management (OPM). He confirmed his admissions in his July 2022 e-QIP. He admitted that he continued to use marijuana about twice a week since July 2022. He typically purchased marijuana from a state dispensary. He was unaware of any company policy prohibiting his marijuana use and expressed his intent to continue his marijuana use until his employer prohibited such activity. He would cease marijuana use if required by his employer to do so, but he would still associate with others who use marijuana. (GE 6)

In his May 12, 2023 response to interrogatories, Applicant confirmed the contents of the OPM interview summary. He further detailed his past drug involvement. From 2006 to 2010, he used marijuana approximately once or twice a week. From 2011 to 2016, he

used marijuana approximately once or twice a year. He further admitted to using psilocybin mushrooms on one occasion in 2008. (GE 6)

In his May 2023 response, Applicant admitted that he had used marijuana as recently as May 2023 and continued to possess marijuana. He expressed his intent to use marijuana in the future, while not actively maintaining a security clearance. (GE 6)

In his July 2023 Answer, Applicant admitted his history of marijuana use as delineated above. He described his recent marijuana use as "from 2021 to the present," indicating that he continued to use marijuana as of July 2023. He clarified his previous remarks about his future intent by reiterating that he is "willing and ready to completely abstain from any use of marijuana while maintaining a security clearance," but he would otherwise use marijuana in compliance with state laws while not possessing a clearance. He acknowledged that his continued marijuana possession and use, even if compliant with state drug laws, violated Federal drug laws. (Answer)

### **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 possession and use of marijuana spanned from 2006 to at least May 2023 (SOR ¶ 1.a.). He repeatedly expressed his intent to use marijuana in the future (SOR ¶ 1.b.). His expressed intent to discontinue his marijuana use was contingent upon his active possession of a security clearance. 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 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 (9<sup>th</sup> 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 disclosed his illegal use of marijuana and his intent to continue to use marijuana in his e-QIP, during his security interview, in his response to the interrogatories, and in his Answer. His marijuana use continued during the security clearance investigation and adjudication process and while employed with a DOD contractor. He acknowledged that his marijuana use violated Federal drug laws and expressed his intent to continue his use. Notwithstanding Applicant's candor during the security clearance investigation, his willful and repeated violation of Federal drug laws casts doubt upon his judgment, reliability, and ability to adhere to rules and regulations. His expressed intent to abstain from marijuana use was contingent upon his active possession of a security clearance. His compliance with Federal drug laws cannot be conditioned upon an active security clearance. Applicant did not mitigate 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 honestly disclosed his longtime marijuana use and his intent to continue such use, in knowing violation of Federal drug laws. This honesty does not overcome the security concerns arising from his drug involvement and substance misuse. 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