



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



In the matter of: )  
)  
) ISCR Case No. 23-01415  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel  
For Applicant: *Pro Se*

02/26/2024

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**Decision**

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BORGSTROM, Eric H., Administrative Judge

Applicant purchased and used marijuana from about April 2021 until August 2023, including after he had been granted access to classified information. His candor does not overcome the concerns raised by his repeated and recent violations of Federal and state drug laws, his employer's policies, and DOD policies prohibiting drug use by clearance holders. 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 August 2, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The DCSA 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 his August 15, 2023 response to the SOR (Answer), Applicant admitted all four allegations without any explanation. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge.

On August 31, 2023, the Government was ready to proceed to hearing. I was assigned this case on December 20, 2023. On January 5, 2024, DOHA issued a Notice of Hearing, scheduling a hearing by video teleconference for January 24, 2024. The hearing proceeded as scheduled. The Government proffered four exhibits, which I admitted as Government Exhibits (GE) 1 through 4 without objection. Applicant and one witness testified. Applicant did not proffer any documentary evidence. At Applicant's request, I held the record open until February 14, 2024, for him to supplement the evidentiary record. DOHA received the hearing transcript (Tr.) on January 31, 2024. Applicant did not submit any further evidence, and the record closed on February 14, 2024.

### **Findings of Fact**

Applicant is 27 years old. He graduated from high school in June 2014. He has attended some college-level classes on and off since September 2014, but he has not completed a degree. From November 2016 to December 2019, he was employed as a security guard for a DOD contractor. Since December 2019, he has been employed as an X-ray technician for a different DOD contractor. He was granted a secret security clearance in January 2022, and he currently wears a badge enabling him to operate sensitive or classified equipment. (GE 1-2; Tr. 21-25)

On November 15, 2021, Applicant completed and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Under Section 23 - Illegal Use of Drugs or Drug Activity, he responded "NO" to all of the queries. (GE 1)

On September 30, 2022, Applicant completed and submitted an updated e-QIP. Under Section 22 - Police Record, he disclosed that he was arrested and charged with possession of marijuana in December 2021 while traveling outside his state of residence. In August 2022, he was sentenced to Accelerated Rehabilitation Disposition and placed on probation for six months. He was required to participate in monthly drug testing. Under Section 23 - Illegal Use of Drugs or Drug Activity, Applicant reported on his e-QIP that he had used marijuana approximately "every other day" from December 2021 to September 2022 to alleviate pain and inflammation from an injury. In about December 2021, he applied for a medical marijuana card in his state of residence. He further reported that he had used marijuana while possessing a security clearance and that he intended to use marijuana in the future for pain management. (GE 2)

During his February 2023 security interview and at hearing, Applicant provided further details about his use of marijuana. In April 2021, he was diagnosed with a herniated disc. He first purchased and used marijuana in April 2021, after the pain became unbearable. He did not use marijuana again until December 2021, shortly before he was arrested for possession of marijuana and possession of drug paraphernalia. On or about December 26, 2021, he purchased marijuana prior to a nine-hour drive from his state of residence to a state where recreational marijuana was illegal. He traveled for several hours, with the marijuana in his car, and he was pulled over for speeding. He was arrested and charged with (1) possession of marijuana, a misdemeanor; (2) possession of drug paraphernalia, a misdemeanor; and (3) speeding, a traffic offense. In August 2022, he was sentenced to probation for six months and was required to participate in random drug

tests. At the hearing, Applicant testified that he successfully completed probation in February 2023; however, he did not provide any corroborating documentation. (GE 2-4; Answer; Tr. 28-32)

At the hearing, Applicant admitted that he used marijuana about once or twice a month from December 2021 to August 2023. He obtained a medical marijuana card in April 2022, and he would purchase marijuana from state-licensed dispensaries. At times, when the pain was severe, he used marijuana as often as "every other day," as reported in his September 2022 e-QIP. He was aware throughout the span of his marijuana use that such conduct violated Federal drug laws, his employer's zero-tolerance drug policy, and DOD policies for clearance holders. He explained that he used marijuana because he believed it was less risky or dangerous than using opioids or other prescription pain medication to manage his pain. He has not informed his supervisor or his facility security officer about his marijuana use, but he has attempted to contact his employer's employee assistance program regarding his drug use. Upon receiving the SOR in August 2023, Applicant re-evaluated his use of marijuana in light of the potential consequences for his clearance eligibility and employment; however, he used marijuana once in about August 2023 after having received the SOR. (Answer; GE 3; Tr. 25-50)

### **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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

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 knowingly and repeatedly violated Federal laws and his employer's drug policy by purchasing, possessing, and using marijuana between April 2021 and August 2023. He was granted access to classified information in January 2022 and operated sensitive or classified equipment while maintaining that access. He knowingly violated DOD policies prohibiting clearance holders from using illegal drugs when he used marijuana about once or twice a month but sometimes every other day, between January 2022 and August 2023. In December 2021, he was charged with possession of marijuana and possession of drug paraphernalia, both misdemeanors. AG ¶¶ 25(a), 25(c), and 25(f) 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 candidly disclosed his marijuana use in knowing violation of Federal drug laws, DOD policies for clearance holders, and his employer's policies. The fact that he used marijuana after acknowledging its illegality and while maintaining access to classified information are aggravating factors. 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.").

Applicant credibly testified that he only used marijuana when he found his pain unbearable, and he used marijuana because he was concerned about using opioids or other prescription pain medication. After receiving the August 2023 SOR, he recognized the significant consequences that his marijuana use posed for his employment and clearance eligibility. Nonetheless, he used marijuana once after receiving the SOR. Notwithstanding Applicant's candor, he has not demonstrated a sufficient pattern of abstinence nor a significant change in circumstances to avoid further drug involvement given the frequency and recency of his involvement with marijuana. He 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 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 honestly disclosed his frequent marijuana use; however, this honesty does not overcome the security concerns arising from his frequent and recent involvement with marijuana, including while granted access to classified information and equipment. In the future, with the passage of time, continued abstinence and changed circumstances, he may be able to mitigate these 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