



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



In the matter of:

ISCR Case No. 23-01403

Applicant for Security Clearance

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Dak Kees, Esq.

04/17/2025

Decision

HOGAN, Erin C., Administrative Judge:

On August 15, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented within the Department of Defense on June 8, 2017.

On November 13, 2023, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on September 3, 2024. On November 5, 2024, a Notice of Hearing was issued, scheduling the hearing on January 8, 2025. The hearing was held as scheduled. During the hearing, the Government offered one exhibit, which was admitted without objection as Government (GE) Exhibit 1. The Government requested that administrative notice be taken of a state marijuana statute.

The request was granted. Applicant testified, called four witnesses and offered 14 exhibits, which were admitted without objection as Applicant Exhibits (AE) A - O. The transcript was received on January 17, 2024. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in the SOR.

Applicant is a 27-year-old employee of a DOD contractor who seeks to maintain a security clearance. He was first granted a security clearance in July 2021 when he worked as a civilian employee for the military (Employer A) in another state. He has been employed with his current employer (Employer B) since February 2023. He has no active military service. He earned a bachelor's degree in 2021 and a master's degree in 2024. He is single and has no children. (GE 1; Tr. 8, 13, 20-23; GE 2; AE C; AE E; AE O; AE V; AE W)

(Note: The facts in this decision do not specifically describe employment, names of witnesses, or locations in order to protect Applicant's and his family's privacy. The cited sources contain more specific information.)

Under the drug involvement security concern, the SOR alleged Applicant used marijuana with varying frequency from about March 2022 to about October 2022, while possessing a security clearance. (SOR ¶ 1.a: GE 1 at 44, 46) It was also alleged that Applicant expressed an intent to use marijuana in the future on his January 3, 2023, Electronic Questionnaire for Investigations Processing (e-QIP). (SOR ¶ 1.b: GE 1 at 44)

On January 3, 2023, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP). In response to Section 23 – Illegal Use of Drugs or Drug Activity, he answered “yes” to the question, “In the last seven (7) years have you illegally used any drugs or controlled substances?” he answered, “yes.” He listed that he used THC (marijuana) edibles about four times from March 2022 to October 2022. This was the first time he tried marijuana edibles. He was employed by Employer A and had an active security clearance during the period that he used marijuana edibles. (AE 1 at 44; 46) At the time he used marijuana, it was illegal in the state where he used it. (Admin Not 1) Marijuana remains illegal under federal law.

The January 2023 e-QIP application also asked Applicant about whether he intended to use marijuana in the future. He responded:

I intend to move to an area where edibles are legal, so I may intend to continue taking them in the future. (GE 1 at 44)

During the hearing, Applicant testified that he wanted to be truthful and forthcoming on his e-QIP when he expressed his future intent to use marijuana. He did not understand the difference between state and federal law. He now understands and does not intend to use marijuana in the future. He states that he is not a marijuana user. If given the opportunity, he would change or reword his answer regarding his future intent to use marijuana. He has no intention of using marijuana under any circumstances. (Tr. 14-16)

Applicant indicated his use of marijuana edibles from March 2022 to October 2022 on approximately four occasions were the only times he used marijuana. He ingested marijuana edibles at social gatherings with friends. He does not consider himself to be an avid or habitual drug user. His marijuana use was experimental. Before the SOR was issued, he did not understand the consequences of using marijuana while working and holding a security clearance. He believed it was something he could experiment with. He used marijuana when he worked for Employer A and had a secret security clearance. This was his first job after graduating from college and it was his first time away from his family for an extended period of time. In hindsight, he would have never consumed marijuana. It was not worth it. He believes he is trustworthy and has good judgment. (Tr. 17-21)

Under cross-examination, the Government's counsel asked Applicant the following question:

So, you haven't used marijuana since October of 2022. Is that correct?
(Tr. 27)

Applicant answered:

I decline to answer that question. (Tr. 27)

After closing arguments, Applicant's counsel was given time off the record to discuss with Applicant about whether he should answer the question regarding if he used marijuana since October 2022. Applicant still declined to answer this question. (Tr. 59)

On September 6, 2023, Applicant signed a statement of intent to remain free from all drugs, including marijuana, and to refrain from any alleged substance abuse. He acknowledged any future involvement with drugs or misuse of the same will be grounds for revocation of my security clearance and any national security clearance eligibility. He agreed to submit to random urinalysis inspections. (AE C)

Applicant underwent drug tests on August 23, 2023, September 6, 2023, September 21, 2023, October 6, 2023, October 20, 2023, and November 11, 2023. All

tests were negative for drugs. On November 14, 2024, Applicant's hair follicles were tested for marijuana. The tests were negative for drugs. (AE D)

On September 20, 2023, Applicant underwent a drug and alcohol evaluation at a center that has an accredited substance abuse counseling program. The material used to determine and assess his alcohol and drug behavior included a clinical interview, which uses the Diagnostic and Statistical Manual for Mental Disorders (DSM V) criteria for substance abuse and mental health disorders. The clinician also reviewed Applicant's past history of drug and alcohol use. The results revealed that Applicant's infrequency and amount of current drug and alcohol consumption does not meet the DSM-V criteria for substance use disorder. No additional treatment was recommended. (AE E)

Whole-Person Factors

Several of Applicant's supervisors in his current job testified on his behalf. Mr. B. is a group supervisor. He supervises over 50 employees. Applicant has been in his group for close to two years. Applicant does not report to him directly. He sees him on a weekly basis. He is aware of the SOR allegations. He meets with Applicant's direct supervisor every other week. Applicant is known as an excellent employee. He is attentive to details, communicates effectively and is very professional. (Tr 30-35)

Mr. M. is Applicant's direct supervisor. He has held a top-secret security clearance since January 2013. He first met Applicant during Applicant's job interview in November 2022. He started working in the Spring 2023, and Mr. M. became his supervisor in the fall 2023. He interacts with him daily. He is aware that the security concerns in Applicant's case involve drug use. He has spoken with him numerous times over the past six months about the security clearance proceeding. He has kept a good attitude. He states that Applicant is a very valuable member of his department, and he does not want to lose him. He is very enthusiastic about his work. He is very trustworthy and honest, and he highly respects him. He considers him one of the best and brightest of the young employees. (Tr. 39-47)

Mr. G.M. has held a top-secret security clearance for over a decade. He shares an office with Applicant. He sees him every day. Applicant told him about his past marijuana use. He is not proud of it. Mr. G.M. trusts Applicant implicitly. He is extremely competent and very responsible. He takes security very seriously. (Tr. 48-51)

Applicant's sister testified on his behalf. She is very close to him and considers him to be one of her best friends. She spoke with him about his past marijuana use. He is heartbroken about his past marijuana use. He is passionate about his job. She testified that he does not currently use drugs. She was never present during Applicant's drug

usage but is aware that he used marijuana during the summer of 2022. She believes his last use of marijuana occurred in October 2022. (Tr. 53 – 58)

Applicant submitted several character letters from family members, friends, and work colleagues. All of whom attest to his outstanding work ethic, character, reliability and trustworthiness. (AE K)

Applicant's performance appraisal during the 2022 rating period was rated "A" which is the highest level. (AE I) In August 2023, he received a Peer Recognition Award for going above and beyond to train and educate a summer intern. (AE J)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied 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(c), 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 as to obtaining 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 classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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).

DOD and Federal Government Policy on Marijuana Use

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, “Adherence to Federal Laws Prohibiting Marijuana Use,” addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. “An individual’s disregard for federal law pertaining the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.”

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, “Federal Laws and Policies Prohibiting Marijuana Use.” The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use, but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus, knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

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 emphasizes that federal law remains unchanged with respect to the illegal use, possession, production, and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription drug 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 disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant's case.

AG ¶ 25(a) any substance misuse;

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position; and

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The SOR alleges and Applicant admits he used marijuana from approximately March 2022 to October 2022, while possessing a security clearance. Marijuana use was illegal in the state where he used it and he is aware that marijuana use remains illegal under federal law. There is sufficient evidence to conclude that Applicant illegally used and possessed marijuana. AG ¶ 25(a), AG ¶ 25(c) and AG ¶ 25(f) apply.

AG ¶ 25(g) applies because Applicant indicated on his January 2023 e-QIP application that he intended to move to an area where marijuana edibles are legal so he could continue taking them in the future.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(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.

AG ¶ 26(a) does not apply. I cannot conclude Applicant's marijuana use happened so long ago and is unlikely to recur because he refused to answer the question about whether he used marijuana after October 2022. Applicants are expected to be truthful and honest during security clearance proceedings at all times. His failure to answer this question prevents me from concluding that his marijuana use was in the past and unlikely to recur. It also raises doubt about Applicant's current reliability, trustworthiness, and good judgment. I cannot conclude he is serious his intentions to refrain from illegal marijuana use.

AG ¶ 26(b) partially applies because Applicant acknowledged his illegal drug use and signed a statement of intent indicating he will not use marijuana in the future. He acknowledged any future illegal use could result in the revocation of his security clearance. However, this mitigating condition is given less weight because he refused to answer the question about whether he used marijuana after October 2022. It lessens the weight of his statement of intent to refrain from future marijuana use and raises questions about his trustworthiness and reliability.

Applicant did not meet his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance 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(a):

(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 Applicant's performance awards and favorable character references. He is highly thought of by his supervisor, friends, co-workers and family members. If Applicant had answered the question about whether he has used marijuana since October 2022, he might have mitigated the security concerns under Guideline H. Instead, it raises additional questions and concerns regarding his failure to cooperate during his security clearance background investigation. When he started using marijuana, he did not think it was a big deal and did not think that he would be severely punished for it. His failure to take seriously the prohibition against marijuana use for DOD employees and persons with access to classified information and employed in sensitive positions raise questions about his ability to follow the rules to protect classified or sensitive information.

I considered the potentially disqualifying and mitigating conditions as well as the facts and circumstances surrounding this case. Applicant is an accomplished young man and has a lot to offer. However, I cannot ignore his refusal to answer the question about whether he used marijuana after October 2022. It raises questions about his reliability and trustworthiness. The security concerns under Drug Involvement are not mitigated.

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, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ERIN C. HOGAN
Administrative Judge