



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



In the matter of:

REDACTED

Applicant for Security Clearance

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ISCR Case No. 16-03252

**Appearances**

For Government: Jeff A. Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

10/12/2017

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana in edible form one time in May 2016, while he possessed a security clearance and knowing it was illegal under federal law and contrary to his security clearance eligibility. He did not purchase the drug and intends no future drug involvement. Clearance is granted.

**Statement of the Case**

On November 4, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H (drug involvement) and Guideline E, personal conduct. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On November 28, 2016, Applicant answered the SOR allegations and requested a decision on the written record without a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On December 29, 2016, the Government submitted a File of Relevant Material (FORM) consisting of three exhibits (Items 1-3). DOHA forwarded a copy of the FORM to Applicant on December 30, 2016, and instructed him to respond within 30 days of receipt. Applicant received the FORM on January 4, 2017. No response to the FORM was received by the February 3, 2017 deadline. On October 1, 2017, I was assigned the case to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.<sup>1</sup>

### **Evidentiary Ruling**

Department Counsel submitted as Item 3 a summary of a subject interview of Applicant conducted on July 22, 2016. The summary was part of the DOD Report of Investigation (ROI) in Applicant's case. Under ¶ E3.1.20 of the Directive, a DOD personnel background report of investigation may be received in evidence and considered with an authenticating witness, provided it is otherwise admissible under the Federal Rules of Evidence. The interview summary did not bear the authentication required for admissibility under AG ¶ E3.1.20.

In ISCR Case No. 15-01807 decided on April 19, 2017, the Appeal Board held that it was not error for an administrative judge to admit and consider a summary of personal subject interview in the absence of any objection to it or any indication that it contained inaccurate information. The applicant in that case had objected on appeal to the accuracy of some of the information in a FORM, but had not objected to the interview summary or indicated that it was inaccurate in any aspects when she responded to the FORM.

Unlike the applicant in ISCR Case No. 15-01807, Applicant did not submit a response to the FORM submitted in his case. However, as in ISCR Case No. 15-01807, Applicant was provided a copy of the FORM and advised of his opportunity to submit objections or material that he wanted the administrative judge to consider. In a footnote, the FORM advised Applicant of the following:

**IMPORTANT NOTICE TO APPLICANT:** The attached summary of your Personal Subject Interview (PSI) (Item 3) is being provided to the Administrative Judge for consideration as part of the record evidence in this

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<sup>1</sup> Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

case. In your response to this File of Relevant Material (FORM), you can comment on whether the PSI summary accurately reflects the information you provided to the authorized OPM investigator(s) and you can make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate. Alternatively, you can object on the ground that the report is unauthenticated by a Government witness. If no objections are raised in your response to the FORM, or if you do not respond to the FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case.

Concerning whether Applicant understood the meaning of authentication or the legal consequences of waiver, Applicant's *pro se* status does not confer any due process rights or protections beyond those afforded him if he was represented by legal counsel. He was advised in ¶ E3.1.4 of the Directive that he may request a hearing. In ¶ E3.1.15, he was advised that he is responsible for presenting evidence to rebut, explain, or mitigate facts admitted by him or proven by Department Counsel and that he has the ultimate burden of persuasion as to obtaining a favorable clearance decision. While the Directive does not specifically provide for a waiver of the authentication requirement, Applicant was placed on sufficient notice of his opportunity to object to the admissibility of the interview summary, to comment on the interview summary, and to make any corrections, deletions, or updates to the information in the report. He was advised that if he did not respond, the interview summary may be considered as evidence in his case. Applicant chose to rely solely on the record presented in the FORM, which included the information reflected in the interview summary, however disqualifying, mitigating, or exculpatory the information. I cannot presume without any evidence that Applicant failed to understand his due process rights or obligations under the Directive or that he did not want the summary of his interview considered in his case. Accordingly, I accepted Item 3 in the record, subject to issues of relevance and materiality in light of the entire record, including Applicant's admissions to the allegations.

### **Findings of Fact**

The SOR alleges under Guideline H (SOR ¶ 1.a) and cross-alleges under Guideline E (SOR ¶ 2.a) that Applicant used marijuana in May 2016 after he had been granted a DOD security clearance on December 29, 2005. When he answered the SOR allegations, Applicant admitted the use of marijuana on one occasion in May 2016 as alleged. He explained that he consumed "approximately ¼ of an edible caramel containing the Indica variety of marijuana. He added that while the use was legal in his state, he knew that his use was contrary to his security clearance eligibility. He apologized for his disregard of federal law on the issue of marijuana use and indicated that it would not happen again.

Applicant's admission to the use of marijuana in knowing disregard of federal law and the obligations of his security clearance eligibility is incorporated as a finding of fact. After considering the FORM, which includes Applicant's Answer to the SOR as Item 1, I make additional findings of fact as follows.

Applicant is a 37-year-old senior mechanical engineer. He and his spouse married in September 2008, and they have two sons now ages two and four. Applicant began working part time for a defense contractor (company X) in May 2003 while also attending a community college starting in September 2003. He was granted a DOD secret security clearance in December 2005. From January 2007 to December 2009, Applicant was a professional cyclist with a world-tour team. After his contact with the cycling team ended, he attended college while working part time for company X. He earned his associate's degree in June 2011 and his bachelor's degree in May 2012. In February 2014, Applicant began full-time employment in the civilian sector while continuing to maintain his part-time position with company X. (Items 2-3.) He purchased his current residence in December 2012. (Item 2.)

On February 2, 2016, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) to renew his security clearance eligibility for his part-time work with company X. Applicant did not disclose any issues of potential security concern. (Item 2.) In June 2016, Applicant changed his full-time job. (Item 3.)

On July 22, 2016, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant indicated that he used marijuana one time in May 2016. He explained that he was with his supervisor, who provided him with an edible piece of caramel that contained marijuana. Applicant explained that marijuana use was legal in his state, but he knew that he is not to use any drugs while holding a DOD security clearance. He stated that he felt pressured by his supervisor to experiment with the drug. He denied any other drug use and any intention to use marijuana again. Applicant indicated that, if required, he would inform his employer about his marijuana use. (Item 3.)

In response to the SOR, Applicant explained on November 28, 2016, that the edible containing the Indica variety of marijuana that he used in May 2016 was legal in his state of residence. He stated that he was told by a friend that it would help him relax, and he had "a number of life stresses going on at the time including changing jobs, and being separated from [his] wife."<sup>2</sup> Applicant added in part:

I knew that I was not supposed to use the substance because of my security clearance. It was a mistake that I regret. Part of my justification at the time was based on the fact that I had just done my security clearance renewal and through I would not have to disclose the use for another ten years, at which time it would be legal federally and therefore forgivable.

For my security clearance renewal there was a second interview, in person, after the use. During that interview, I chose to be honest and disclosed the single use.

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<sup>2</sup> The summary of Applicant's July 22, 2016 interview does not mention any marital problems or marital separation.

I am truly sorry for the momentary disregard for the federal stance on the use of marijuana. It has not happened since and will not happen again, even given [state] laws. (Item 1.)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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.” 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 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 classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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).

## Analysis

### Guideline H: Drug Involvement and Substance Misuse

The security concerns about drug involvement and substance misuse are articulated 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.

Applicant knowingly ingested marijuana in edible form on one occasion in May 2016. He had a security clearance at that time and knew that marijuana was not only illegal under federal law, but also against his security clearance eligibility. Disqualifying conditions AG ¶ 25(a), "any substance misuse," and AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position," apply. AG ¶ 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," is only minimally established. Applicant did not purchase the drug, although he had physical possession of the edible containing marijuana when he consumed it.

There is no evidence that Applicant has otherwise used marijuana or any other illegal drug. AG ¶ 26(a) has some applicability in mitigation in that it was "so infrequent." AG ¶ 26(a) provides:

(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.

However, his use in knowing contravention of federal law and the obligations of his security clearance eligibility casts doubt on his reliability, trustworthiness, and judgment.

AG ¶ 26(b) provides for mitigation when an individual acknowledges his drug involvement and has no intention of future drug activity:

(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 told the OPM investigator in July 2016 that his supervisor gave him the edible containing marijuana and that he felt pressured to experiment with it. He provided a slightly different version in November 2016 when he indicated that “a friend” gave him the edible containing marijuana to relax when he was dealing with the stress of changing jobs and marital separation. The summary of Applicant’s July 2016 interview makes no mention of any marital problems he may have had in May 2016, but it does note the change of his full-time job in June 2016. Given Applicant’s longtime part-time employment with company X, it would not be surprising if Applicant socialized with his supervisor, whom Applicant indicated in July 2016 could verify his drug use. Applicant did not indicate in July 2016 or in November 2016 that he had disassociated himself from the person involved in his marijuana use in May 2016.

Mitigation turns on whether Applicant can be believed when he asserts that he has no intention of using any marijuana or other illegal drug in the future. Applicant’s use of marijuana was recent and occurred after he had applied to renew his security clearance. It is clear that he thought he would get away with it in that he could not have to disclose until his security clearance again came up for renewal in ten years. He evidently did not anticipate that he would be interviewed. His candid disclosure of his recent marijuana use during his in-person interview reflects favorably on his credibility and allows me to accept as sincere his stated intention not to use any marijuana or other illegal drug as long as federal law prohibits the use. Applicant’s notarized response to the SOR, in which he stated that his marijuana use would not happen again, suffices to satisfy AG ¶ 26(b)(3). Applicant’s drug use appears to have been situational and not characteristic of his recreational or social activities. The drug involvement security concerns are mitigated.

### **Guideline E: Personal Conduct**

The concerns about personal conduct are articulated in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

Concerning the Government’s case for disqualification under the personal conduct guideline because of Applicant’s marijuana use and the fact that he used the drug while

holding a clearance (SOR ¶ 2.a), the DOHA Appeal Board has held that security-related conduct can be alleged under more than one guideline, and in an appropriate case, be given independent weight under each. See ISCR 11-06672 (App. Bd. Jul. 2, 2012). Applicant had an obligation as a clearance holder to comply with DOD policy, including the prohibitions against drug involvement. Applicant consumed an edible containing marijuana in May 2016, knowing that it was prohibited under federal law, although legal in his state, and in violation of his clearance obligations. His use of marijuana has security significance apart from whether he is reformed of his drug involvement because it shows a disregard of rules and regulations.

Applicant's marijuana use in violation of his security clearance obligations is covered under AG ¶ 25(f) of Guideline H, so even though it may be considered inappropriate behavior and a rule violation, disqualifying condition AG ¶ 16(d) does not strictly apply. AG ¶ 16(d) provides:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient in and of itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

His marijuana use in violation of his security clearance obligations is activity which could affect his professional standing with his employer under AG ¶ 17(e), which provides:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.



Additionally, AG ¶ 17(g), “association with persons involved in criminal activity,” could arguably apply if the person who gave him the marijuana held a security clearance. While the purchase may well have been legal in the state, it would be considered criminal conduct under federal law.

Similar to AG ¶ 26(a) under Guideline H, AG ¶ 17(c) under Guideline E provides for mitigation when the behavior of security concern is “so infrequent.” AG ¶ 17(c) states:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.

AG ¶ 17(c) applies because his use of marijuana was limited to a single occasion. Yet, his knowing contravention of federal law and the requirements of his security clearance was recent and casts doubt about his judgment and reliability.

AG ¶ 17(d) has some applicability in that Applicant informed the OPM investigator about his marijuana use. In response to the SOR, he expressed regret for his drug use and apologized for the behavior. AG ¶ 17(d) provides:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Assuming Applicant took the marijuana to relax, there is no evidence that he obtained counseling to alleviate the stress that led him to consume the marijuana. Without some evidence of his present circumstances, especially regarding his marital separation, I cannot conclude that the stressful life circumstances that contributed to his marijuana use are behind him or unlikely to recur. Yet, the absence of any recurrence of marijuana use since May 2016 would indicate that Applicant is appropriately managing the stress in his life without resorting to substance use or misuse.

Applicant’s disclosure of his marijuana use to the OPM investigator is a positive step that reduces or eliminates his vulnerability to exploitation, manipulation, or duress under mitigating condition AG ¶ 17(e). It is unclear whether he currently socializes with the person who provided him the marijuana edible. However, there is also no evidence that Applicant has been around marijuana since that occasion in May 2016. AG ¶ 17(g), “association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual’s reliability, trustworthiness, judgment, or willingness to comply with rules and regulations,” would apply in the absence of any evidence of ongoing association or activities conducive to illegal drug involvement. His knowing disregard of federal law and DOD clearance requirements is not condoned, but it is not likely to be repeated.

## 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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).<sup>3</sup> In making the overall commonsense determination required under AG ¶ 2(a), I have to consider Applicant's circumstances when he used marijuana. He was 35 years old, the father of two young boys, a homeowner, and held full and part-time jobs as a mechanical engineer. Given his part-time employment was with a defense contractor, he may not have had regular access to classified information, but he knew that he was not supposed to use marijuana because of his security clearance.

There is no evidence that Applicant has mishandled any classified information. The Appeal Board has repeatedly held that the government need not wait until an applicant mishandles or fails to safeguard classified information before denying or revoking security clearance eligibility. See, e.g., ISCR Case No. 08-09918 (App. Bd. Oct. 29, 2009, citing *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)). Applicant's honesty about his drug use does not entitle him to retain his security clearance. As a clearance holder, he has an obligation of full candor, even with respect to conduct that could cost him his security clearance eligibility. At the same time, security clearance determinations are not intended as punishment for past wrongdoing. Rather, the security clearance adjudication involves an assessment of an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). Applicant understands that he made a serious misjudgment, and he is resolved to not repeat it. His use of marijuana after he applied to renew his security clearance eligibility is not condoned, but it also appears to have been aberrational. For the reasons noted above, it is clearly consistent with the national interest to continue his security clearance eligibility.

## 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:                   FOR APPLICANT

Subparagraph 1.a:                           For Applicant

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<sup>3</sup> The factors under AG ¶ 2(d) are as follows:

(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.

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

### **Conclusion**

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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Elizabeth M. Matchinski  
Administrative Judge