DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 20-01145
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*
07/19/2021

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Decision

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MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 20, 2019. On August 5, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and J. The DCSA CAF 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 (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on a date not reflected in the record, and requested a decision based on the written record in lieu of a hearing. On March 3, 2021, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 5. He was given an opportunity to submit a documentary response setting forth objections,

rebuttal, extenuation, mitigation, or explanation to the Government's evidence. He received the FORM on March 10, 2021, and did not respond or object to the Government's evidence. The case was assigned to me on May 7, 2021.

Evidentiary Matters

Items 1 and 2 contain the pleadings in the case. Items 3 through 5 are admitted into evidence. Applicant's SOR Answer included an evidentiary document that I admitted into evidence as Applicant Exhibit (AE) A. Item 5 was not authenticated as required by Directive ¶ E3.1.20. However, I conclude that Applicant waived any objection to Item 5. The Government included in the FORM a prominent notice advising Applicant of his right to object to the admissibility of Item 5 on the ground that it was not authenticated. Applicant was also notified that if he did not raise an objection to Item 5 in his response to the FORM, or if he did not respond to the FORM, he could be considered to have waived any such objection, and that Item 5 could be considered as evidence in his case. As noted above, Applicant neither responded to the FORM nor objected to Item 5.

I *sua sponte* took administrative notice of the documents discussed below, which are identified in the record as Administrative Exhibits (AX) I through X.

Administrative Notice

In his SOR answer, Applicant referenced a state statute concerning protections for the medical use of marijuana.

Because neither party submitted a copy of this statute, I *sua sponte* appended the referenced statute to the record as AX I. I also appended, as AX II and III, the two amendments referenced in AX I, and AX IV, a related relevant statute. I *sua sponte* take administrative notice of the facts contained in AX I through IV, including the following:

1. The state statute was enacted in 2008.

2. Relevant rules relating to allowable amounts for the use and cultivation of marijuana include: 1) use by a qualified patient of an amount of marijuana that does not exceed a combined total of 2.5 ounces; and a combined total of 2.5 ounces, as a primary caregiver for use by each qualifying patient to whom he or she is assisting; 2) cultivation by a qualified patient of 12 marijuana plants; and as a primary caregiver, 12 marijuana plants for each registered qualifying patient.

I also *sua sponte* took administrative notice of the fact that the use and possession of marijuana is a criminal violation of federal law. Relevant federal guidance, issued by the: Director of National Intelligence (DNI) in October 2014 (AX V); Office of Personnel Management (OPM) in May 2015 (AX VI); Office of the Attorney General (OAG) in January 2018 (AX VII); and Office of the Assistant Secretary of Defense (OASD) in February 2018 (AX VIII), make clear that: 1) marijuana remains a Schedule I controlled substance under federal law, that changes in the laws pertaining to marijuana by states,

territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that federal marijuana laws supersede state laws; and 2) an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.

In August 2016, the Drug Enforcement Administration denied a petition to reschedule medical marijuana as a Schedule II controlled substance, on the following basis: "[Marijuana] does not have a currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse." (AX IX).

In 2008, the state in which Applicant resides enacted a law allowing for the medical use of marijuana, subject to various administrative rules and regulations. (AX X).

Because neither party provided the relevant federal guidance, I *sua sponte* appended them to the record as AX V through AX IX, respectively. I also appended the 2008 state law as AX X.

Findings of Fact

Applicant, age 37, is unmarried without children. He attended high school from 1998 through 2002 but did not earn a diploma. He has been employed as a laser tracker operator by a defense contractor since February 2015. He was previously employed as both a fabricator and a welder. This is his first application for a security clearance. (Item 3)

In May 2005, Applicant was pulled over for having a headlight out. During a search of his vehicle, the police officer discovered marijuana. Applicant was then arrested and charged with one count of misdemeanor possession of dangerous drugs. A prosecutor later amended the charge to one count of possession of marijuana. In October 2005, Applicant plead guilty to the amended charge and was sentenced to 12 months of probation. Applicant described the marijuana found in his vehicle as a: marijuana "roach" (in his SCA); and as "less than 1 gram" of marijuana (in his SOR answer). (Item 2; Item 3 at 29; Item 4 at 2-3)

In December 2005, Applicant hit a patch of ice and lost control while driving his father's vehicle. A police officer stopped to assess whether Applicant needed medical attention. During a search of his person, the police officer found that Applicant was in possession of Vicodin. Applicant told the police officer that it was a prescribed medication, but he did not have either the prescription itself or the bottle with him. Applicant was then arrested. Subsequent to his arrest, the vehicle was inventoried during which the police officer found marijuana located in a cup holder. Because he could not afford bail and no one would pay for him to be released, Applicant spent the weekend in jail. While he claimed that the marijuana belonged to his father, and that he did not know that it was in the vehicle, he pled guilty to possession of marijuana for which the court sentenced him to one year of probation and fined him $600. The record does not indicate whether Applicant suffered any additional consequences for being arrested while on probation for

the May 2005 incident. Applicant described the marijuana found in the vehicle as: ".1g of marijuana" (in his SCA); a "testable amount" of marijuana (during his 2019 security clearance interview); and "a small amount" of marijuana (in his SOR answer). (Item 2; Item 3 at 28-29; Item 5 at 2)

The SOR alleged that the December 2005 incident occurred in December 2004, apparently based on the dates Applicant's self-reported on his March 2019 SCA and during his June 2019 security clearance interview. In his SOR answer, Applicant amended the date to December 2005, stating "I am now sure it was 2005." The Government did not proffer any rebuttal evidence to the 2005 date. (Item 3 at 28-29; Item 5 at 2)

On July 7, 2013, a fire started in the attached garage of a home in which Applicant resided with his mother, sister, and niece. The fire resulted from an accidental electrical short with a lawn mower. While searching his home for other fire damage, the public safety officers (PSO) investigating the fire discovered a marijuana cultivation operation. Additional marijuana was found by police officers called to the scene to further search the home. (AE A)

Applicant asserted that he was operating a medical marijuana cultivation operation in accordance with applicable laws. He provided the officers with the required proof that he was licensed to grow medical marijuana for three duly registered persons, including himself as a qualifying patient and two others (his mother and Person A) as qualifying patients for whom he was their primary caregiver. However, the officers determined that he had more marijuana plants than was allowed and that persons residing in the home had unauthorized access to the plants. Applicant told the officers that he did not realize that he had too many plants and also advised that "some of the plants may die so [I grow] more." He acknowledged that the plants were accessible to everyone who lived in the home. He believed that having the doors locked to his home sufficed to secure the plants, and claimed not to know that they needed to be in a secured location within the home. (AE A)

The PSOs confiscated all of the marijuana in the home and told Applicant that he would be advised about future prosecution. The seized marijuana included nine branches of marijuana "buds," 53 rooted marijuana plants, and 149 grams of marijuana (consisting of one foil pan containing 88 grams, and 61 grams divided among six mason jars). The seized marijuana was found throughout the house, including the basement, adjacent to an upstairs futon, an upstairs drawer, the stairway to an upstairs room, and the upstairs attic bedroom. The Department of Public Safety (DPS) deemed that Applicant forfeited the seized marijuana because he never contacted them to claim any of it. On or about July 12, 2013, Applicant was charged with: 1) felony delivery and manufacturing of marijuana; 2) misdemeanor maintaining a drug house; and 3) misdemeanor use of marijuana. In November 2013, he pled guilty to charge #3 for which he was fined $225. Charges #1 and #2 were dismissed. (AE A; Item 3 at 25-26; Item 5 at 2-3; Item 4 at 3-4)

According to the incident report issued by the DPS, for three individuals, Applicant was allowed a total of 36 plants (12 per individual) and 7.5 grams (2.5 grams per

individual). DPS apparently confused grams and ounces, which likely accounts for the final disposition of the charges. The applicable state law allows a total of 212.62 grams or 7.5 ounces for three duly registered individuals (70.87 grams or 2.5 ounces for each individual), which Applicant did not exceed. He argued that a "major portion" of his excess 17 "rooted plants" consisted of "small cuttings [he] had just made and were not in the soil long." He stated: "I made more than I was going to grow into larger plants because some would take badly to the soil and some would die as I told the officers in the reports." He asserted that he had no intent to grow more than the allowable amount of plants. He acknowledged that "it was a mistake" not to be more strict with his plant count. He has not cultivated any medicinal marijuana since the July 2013 incident and does not have any plans to do so. (AE A; Item 2; AX I through IV)

Applicant began smoking marijuana recreationally in the form of a cigarette, pipe, or bong at the age of 15, when he was in high school. From age 15 to about age 18, he smoked marijuana only on the weekends with friends in social settings. From about age 18 to age 26, he smoked marijuana approximately three to four times per week, in both social settings and by himself. During that period, sometimes he used more than that and sometimes less. In about 2009, at age 26, Applicant discovered that marijuana could help with his chronic back pain. He was evaluated by a doctor and received a medical marijuana license from his state "around 2010." The record does not indicate the circumstances or frequency of his medical marijuana use or the degree to which he may have used marijuana recreationally after receiving his marijuana license. He described the form of medical marijuana he used as: a vaporizer (during his June 2019 security clearance interview); and "mainly edibles" (in his SOR answer). (Item 2; Item 5 at 3)

Applicant's chronic back pain resulted from a herniated disk injury he sustained in 2004 for which he was initially prescribed Vicodin as treatment. He used Vicodin as prescribed until 2005, when he began abusing it. The record does not indicate the circumstances or frequency of his Vicodin use. In April 2005, Applicant voluntarily sought and received treatment for his abuse of Vicodin. He completed only the detoxification portion of the program. After his father passed away in April 2006, he returned for the full program in May 2006. In December 2008, he voluntarily sought and received treatment again because he had become dependent on Vicodin. This time, he attended an outpatient suboxone maintenance program. Suboxone is the medication that he was prescribed to treat his opioid dependency. He maintained that he never abused Subxone and only used it as prescribed by his doctor until February 2019, when he had successfully weaned off of the medication pursuant to a careful plan established by his doctor. The record contained scant details about the nature of his treatment, such as his treatment status (e.g. whether he successfully completed the programs he attended), the aftercare requirements, his prognoses, or whether the period of his Suboxone use was reasonable. In his SCA, Applicant answered "yes" to the question of whether he successfully completed his 2006 and 2008 treatment programs. (Item 2; Item 3 at 31-32; Item 5 at 3-4)

Applicant attributed his use of medical marijuana and his abuse of and dependency on Vicodin to his 2004 back injury. He stated that his father's death exacerbated his Vicodin abuse. He also used marijuana to calm him. He has not used Vicodin or any other

opioids since he entered treatment in 2008. He stopped using marijuana "around the end of 2017." Since then, he has managed his back pain by working out and strengthening the muscles in his lower back, yoga-type stretching, and inversion. He also uses over-the-counter pain relievers, as needed. These efforts have helped him avoid using marijuana or prescribed pain medications. Nowhere in the record does Applicant explicitly state his intent regarding his future use of marijuana or Vicodin. (Item 2; Item 5 at 3)

In his SOR answer, Applicant stated:

> I know that I have made some mistakes in the past and I take full responsibility for them. I have learned from my mistakes and believe I am a better person for it today. I no longer associate with any of the people I called friends that were in my life during the years I was having problems. I realized that without changing my friends I would never be able to make any serious changes in life for the better and I believe it was the right decision.

Policies

"[N]o one has a 'right' to a security clearance." (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." (*Egan* at 527). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (EO 10865 § 7). Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. (*Egan*, 484 U.S. at 531). "Substantial evidence" is "more than a scintilla but less than a preponderance." (*See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994)). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. (ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993)). Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. (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. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005)).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002)). "[S]ecurity clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531; AG ¶ 2(b)).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The concern under this guideline 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 facts and circumstances of Applicant's use of marijuana and Vicodin establish the following disqualifying conditions (DC) under this guideline:

> AG ¶ 25(a): any substance misuse (see above definition);
>
> 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 (d): diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of substance use disorder.

The following mitigating conditions are potentially applicable under this guideline:

AG ¶ 26(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;

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(c): abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's marijuana use, both recreationally and medicinally, spanned 19 years, from 1998 through 2017. His Vicodin abuse and dependency spanned three years, from 2005 through 2008. The state in which Applicant resides has allowed medical marijuana use since 2008 and he obtained his medical marijuana license in 2010. He cultivated marijuana for a period of time pursuant to that license until he was found in violation of certain terms of that license in 2013. Not only has Applicant used marijuana in contravention of federal law, but he also violated state law for a significant period.

Arguably, Applicant's drug-related criminal convictions would lack security significance if viewed in isolation, given the time that has passed since 2005 and 2013. However, together with the facts and circumstances of his drug use, they underscore a pattern of questionable judgment that casts doubt on his ability or willingness to comply with laws, rules, and regulations.

Nowhere in the record does Applicant explicitly state his intent regarding his future use of marijuana or Vicodin. Also absent is a signed statement of intent to abstain from all drug involvement and substance misuse. However, he has taken meaningful steps towards recovery and demonstrated a pattern of abstinence by not using marijuana in

over three years or Vicodin in over 12 years. He voluntarily submitted to treatment when he recognized that he had a problem with Vicodin. He no longer associates with the friends that were in his life "during the years [he] was having problems." He implemented new behaviors and strategies to address his back pain. He accepted full responsibility for his past mistakes.

However, weighing strongly against mitigation is the paucity of evidence about the nature of his treatment and his prognosis. Even assuming that he successfully completed the programs he attended, without more clinical information about his treatments, his aftercare requirements and risk for relapse are unknown. The fact that he continued to use marijuana following his treatment and during periods when he was on Suboxone maintenance is concerning. There remains a question of whether his extended use of Suboxone over 10 years was reasonable under the circumstances. Moreover, he weaned off of Suboxone relatively recently considering his prolonged history of drug use.

Given the record as a whole and these unsettled issues, I am unable to conclude that his drug use is unlikely to recur and I have lingering doubts about his current reliability, trustworthiness, and good judgment. AG ¶ 26(c) was established. However, AG ¶¶ 26(a) and 26(d) were not established, and AG ¶ 26(b) was only partially established. The application of some mitigating factors does not suffice to mitigate the overall Guideline H concerns.

Guideline J: Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

Applicant's drug-related convictions in 2005 and 2013 establish the following disqualifying conditions under this guideline:

> AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
>
> AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The following mitigating conditions are potentially applicable under this guideline:

> AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

> AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has not been convicted of criminal activity since 2013. He has not used marijuana in over three years. However, the facts and circumstances surrounding his 2013 conviction were troubling as was his conviction of a second offense in 2005 while on probation. Although not alleged in the SOR under Guideline J, for the purpose of evaluating mitigation, I must consider that his marijuana use after 2013 violated federal law. Incorporating my analysis under Guideline H, and given the nature of his offenses and lingering concerns about his risk for relapse, there has not been a passage of time sufficient to conclude that his criminal misconduct is unlikely to recur. AG ¶ 32(a) does not apply. While 32(b) was established, it does not suffice to mitigate the ongoing Guideline J concerns.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an 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.

I have incorporated my comments under Guidelines H and J in my whole-person analysis, and considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and J, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his illegal drug use and criminal conduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

Formal findings 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.f:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge