



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



In the matter of:

)  
)  
)  
)  
)

ISCR Case No. 20-03369

Applicant for Security Clearance

**Appearances**

For Government: Andrew W. Henderson, Esq., Department Counsel

For Applicant: *Pro se*

10/15/2021

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant mitigated Guideline G (alcohol consumption) security concerns. However, she failed to mitigate security concerns arising under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

**Statement of the Case**

On May 16, 2020, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On May 21, 2021, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guidelines H and G. (HE 2) On May 25, 2021, Applicant responded to the SOR and requested a hearing. (HE 3)

On June 18, 2021, Department Counsel was ready to proceed. On July 21, 2021, the case was assigned to me. On July 28, 2021, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for August 26, 2021. Her hearing was held as scheduled in the vicinity of Arlington, Virginia using the U.S. Cyber Command video teleconference system. (*Id.*)

During the hearing, Department Counsel offered five exhibits; Applicant offered one exhibit; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 15-18; GE 1-5; Applicant Exhibit (AE) A) On September 3, 2021, DOHA received a transcript of the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, she admitted the SOR allegations in ¶¶ 1.a, 1.b, and 2.a. (HE 3) She denied the allegation in SOR ¶ 2.b. She also provided extenuating and mitigating information. Her admissions are accepted as findings of fact.

Applicant is a 30-year-old program manager, who has been working for a defense contractor since April 2018. (Tr. 7-8; GE 1) In 2009, she graduated from high school, and in 2013, she was awarded a bachelor's degree in civil engineering from an Ivy League university, where she had a full scholarship. (Tr. 7-8, 19, 34) She has not served in the military. (Tr. 8) In August 2020, she married, and she does not have any children. (Tr. 8)

### **Drug Involvement and Substance Misuse**

SOR ¶ 1.a alleges that from about 2013 to August 2020, Applicant used marijuana with varying frequency. She indicated she intended to cease using marijuana once her security clearance is approved. SOR ¶ 1.b alleges that she used marijuana in June 2020 and August 2020 after she completed her SCA on May 16, 2020.

In 2013, after Applicant graduated from college, she used marijuana on two occasions. (Tr. 20-21) She said the next time she used marijuana was in April of 2018. (Tr. 22)

In her May 16, 2020 SCA, Applicant said she answered yes to the question about illegal drug use "due to federal regulations around THC/marijuana," which is an indication she was aware of the federal restrictions on marijuana use. She said in her SCA that her most recent marijuana involvement was in March 2020. (GE 1 at 40) Elsewhere in her May 16, 2020 SCA, she said her most recent marijuana use was around November 2019. (*Id.* at 39) She explained her frequency of marijuana use was "approximately 10-20 times through the years," and she explained as follows: "I have never purchased marijuana

outside state-sanctioned THC/marijuana dispensaries. My first time in a dispensary was after moving [to a state where possession of marijuana under state law is legal] in April 2018; I have been back to the dispensaries a few times (6-10 times since then). (*Id.* at 39-40) On July 17, 2020, an Office of Personnel Management (OPM) investigator reviewed her SCA responses relating to the recency and frequency of her marijuana use, and Applicant agreed she made these responses on her SCA. (GE 2 at 6)

At her hearing, Applicant said when she used marijuana after completion of her SCA, she believed her marijuana use was not prohibited for security reasons because it was not illegal under state law. (Tr. 24) In June and August of 2020, she used marijuana in a state where marijuana use is legal. (Tr. 23) In her response to DOHA interrogatories on December 11, 2020, she said her most recent marijuana use was on August 8, 2020. (GE 2 at 10) At her hearing, she said she did not use marijuana after August 2020. (Tr. 24)

On September 25, 2018, Applicant provided a urine sample for a substance-use evaluation, and a laboratory detected 27 ng/ml of the marijuana or Delta-9-THC-COOH metabolite in her urine sample. (Tr. 26; GE 3) Applicant's October 9, 2018 substance-use evaluation indicates Applicant made a self-report to the evaluator that her most recent marijuana use was on September 1, 2018. (GE 4 at 19)

At her hearing, Applicant said she used marijuana for medical reasons. (Tr. 38) She ended her marijuana use in August 2020, and now she takes vitamins and uses exercise to alleviate her cramps and pain. (Tr. 38-39) She promised not to use marijuana in the future. (Tr. 39)

Applicant's husband continues to use marijuana, and she associates with him. (Tr. 28) She said that he purchases a single marijuana joint at a time, and he does not have any remaining marijuana stored in their house. (Tr. 33)

## **Alcohol Consumption**

SOR ¶ 2.a alleges in August 2018, Applicant was arrested for driving under the influence of alcohol (DUI). Her breathalyzer test result was a blood alcohol content (BAC) of .193. SOR ¶ 2.b alleges in September 2018, a chemical dependency professional evaluated Applicant and diagnosed her with alcohol abuse, uncomplicated.

In August 2018, Applicant and her husband consumed several drinks in a bar. (Tr. 25) Applicant said she consumed four to six drinks of whiskey over about three hours. (Tr. 31) She did not indicate the number of ounces of whiskey in the drinks. They walked home from the bar, and Applicant went to sleep for several hours. (Tr. 25, 30) She awakened and discovered her husband was not in her residence. (Tr. 25) She was worried about him, and she decided to drive around looking for him. (Tr. 25) She was arrested for speeding and DUI. She was surprised her BAC was so high. (Tr. 30) The charges were subsequently dismissed because the police officer had listened to her conversation with her attorney. (Tr. 27, 29; GE 2; GE 5) In 2018, Applicant received a substance-use evaluation, which indicated a "Billing Diagnosis" of alcohol abuse,

uncomplicated. (GE 4 at 17) Her evaluation summary in the clinical notes indicates a diagnosis of alcohol-use disorder severe. (GE 4 at 19)

In August 2021, Applicant received an updated substance-use evaluation. (AE A) The evaluating clinician concluded that she has never had an alcohol-use disorder. (Tr. 27; AE A) She had not received any alcohol-related counseling, and no counseling was recommended. (Tr. 28; AE A at 14-15) The clinician said the “concept of relapse is a non-issue.” (*Id.* at 14) Applicant drinks alcohol at an unremarkable responsible level. (AE A)

In the last year, Applicant has not driven after consuming alcohol. (Tr. 32) The most alcohol she has consumed on any one occasion in the last year is three drinks. (Tr. 32)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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. See *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 Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Drug Involvement and Substance Misuse**

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides two conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition)”; and “(c) illegal possession of a controlled substance. . . .” From about 2013 to August 2020, Applicant used marijuana with varying frequency. She used marijuana in June 2020 and August 2020 after she completed her SCA on May 16, 2020. She possessed marijuana before she used it.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substances. See

Drug Enforcement Administration listing at [http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308\\_11.htm](http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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;

(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;

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

(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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

None of the mitigating conditions fully apply; however, Applicant provided some important mitigating information. She voluntarily disclosed her marijuana use on her SCA, during her OPM interview, in her SOR response, and during her hearing. She ended her marijuana use around August 2020. She promised not to use marijuana in the future.

The evidence against mitigation is more persuasive at this time. In ISCR Case No. 16-03460 at 4 (App. Bd. May 24, 2018), the applicant had a history of marijuana use, and the Appeal Board said:

A clearance adjudication is aimed at determining if an applicant has the requisite judgment and reliability to abide by rules designed to protect classified information. . . . [Security concerns arise if] there is doubt as to whether he [or she] will follow the regulatory requirements for handling classified information, which might, in the event, appear burdensome. Access to national secrets entails a fiduciary duty to the U.S. A person who enters into such a fiduciary relationship is charged with abiding by legal and regulatory guidance regardless of whether he or she believes that guidance to be wise.

Applicant's most recent marijuana use occurred after she was aware of federal rules against marijuana use, and after she completed her SCA. "An applicant who uses marijuana after having been placed on notice of its security significance, such as using after having completed a clearance application, may be lacking in the qualities expected of those with access to national secrets." ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) ("An applicant's misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability)). Applicant's spouse is a marijuana user, and it is likely that she will be in the vicinity of marijuana in the future. It is too soon after her abstinence from marijuana use beginning in August 2020, to rule out her future marijuana use. Guideline H security concerns are not mitigated at this time.

### **Alcohol Consumption**

AG ¶ 21 articulates the Government's concern about alcohol consumption, "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

AG ¶ 22 lists conditions that could raise a security concern and may be disqualifying in this case including:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder; and

(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.

AG ¶¶ 22(a), 22(c), and 22(d) apply. Applicant had one alcohol-related driving incident involving the police and/or the courts in August 2018. Her BAC test for her DUI indicated .193. “Binge drinking is the most common pattern of excessive alcohol use in the United States.” See the Center for Disease Control website, (stating “The National Institute on Alcohol Abuse and Alcoholism defines binge drinking as a pattern of drinking that brings a person’s blood alcohol concentration (BAC) to 0.08 grams percent or above. This typically happens when men consume 5 or more drinks, and when women consume 4 or more drinks, in about 2 hours.”), <https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm>. There are other definitions of “binge-alcohol consumption” that involve different alcohol-consumption amounts and patterns. Applicant engaged in binge-alcohol consumption to the extent of impaired judgment. Her September 2018 substance-use diagnosis indicated alcohol-use disorder.

AG ¶ 23 details conditions that could mitigate security concerns including:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶¶ 23(a) and 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption or responsible alcohol



consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). See also ISCR Case No. 08-04232 (App. Bd. Oct. 9, 2009) (affirming denial of security clearance for Applicant with alcohol-related criminal offenses for six years prior to hearing). In ISCR Case No. 18-02526 (App. Bd. Dec. 20, 2019), the Appeal Board emphasized the lack of an established benchmark period of abstinence from alcohol consumption stating:

As we have previously stated, the Directive does not specify how much time must pass to mitigate the various types of misconduct identified in the adjudicative guidelines. Contrary to the Judge's conclusion, the Board has repeatedly declined to establish a "benchmark" or "bright-line" rule for evaluating the recency of misconduct. The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole.

*Id.* at 3 (citing ISCR Case No. 18-01926 at 4 (App. Bd. Sept. 20, 2019) (reversing grant of security clearance for applicant with three alcohol-related driving incidents with most recent occurring in 2017)).

I have carefully considered the Appeal Board's jurisprudence on alcohol consumption and Applicant's history of alcohol consumption. She had one DUI in August 2018. In 2020, she had an alcohol evaluation that indicated her previous diagnosis of alcohol-use disorder was incorrect. She did not complete an alcohol counseling or treatment program. She does not drive after consuming alcohol. She does not currently engage in binge-alcohol consumption. Enough time has elapsed since her August 2018 DUI to enable a reasonable predictive judgment that her maladaptive use of alcohol is safely in the past. AG ¶ 23(a) applies. Alcohol consumption security concerns are mitigated.

### **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 the 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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guidelines H and G are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 30-year-old program manager, who has been working for a defense contractor since April 2018. In 2013, she was awarded a bachelor’s degree in civil engineering from an Ivy League university, where she had a full scholarship. There is no evidence of security violations, improper disclosure of classified information, or that Applicant compromised national security. See ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (noting admissibility of “good security record,” and commenting that security concerns may nevertheless not be mitigated).

Applicant disclosed her marijuana use on her May 16, 2020 SCA, and during her July 17, 2020 OPM interview, SOR response, and hearing. An honest and candid self-report of drug abuse is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation. However, the mitigating weight of Applicant’s disclosures is undermined by her marijuana use after she completed her SCA and her OPM interview.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. “[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant’s eligibility for access to classified information.” ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board’s jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated alcohol consumption security concerns; however, she failed to mitigate drug involvement and substance misuse 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 and 1.b:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

---

Mark Harvey  
Administrative Judge