



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



In the matter of: )  
)  
) ISCR Case No. 20-03616  
)  
Applicant for Security Clearance )

**Appearances**

For Government: John Lynch, Esq., Department Counsel  
For Applicant: *Pro se*

11/12/2021

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant used marijuana in 2019 after indicating in 2014 and 2015 that he did not intend to use marijuana in the future. He used marijuana while holding a security clearance. Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 7, 2019, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 3). On June 18, 2021, the Defense Counterintelligence and Security Agency, 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; Department of Defense (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. (Item 1)

The SOR detailed reasons why the 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 Guideline H. (Item 1)

On June 28, 2021, Applicant provided a response to the SOR, and he requested a decision without a hearing. (Item 2) On July 30, 2021, Department Counsel completed a File of Relevant Material (FORM). On September 9, 2021, he received the FORM. On September 25, 2021, Applicant provided his response to the FORM. On October 4, 2021, Department Counsel did not object to his response to the FORM. On October 29, 2021, the case was assigned to me.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits. Redacted ISCR and ADP decisions and the Directive are available at website [https://doha.osd.mil/Doha/doha\\_sys.aspx](https://doha.osd.mil/Doha/doha_sys.aspx).

### **Findings of Fact**

In Applicant's SOR response, he admitted the SOR allegation in ¶ 1.a. (Item 2) He also provided mitigating information. Applicant's admission is accepted as a finding of fact. Additional findings follow.

Applicant is 29 years old, and he has worked for defense contractors as a mechanical engineer or as an associate member staff engineer since December 2014. (Item 3 at 7, 16-19) In 2014, he was awarded a bachelor's degree, and since 2016, he has been participating in a post-graduate education program. (*Id.* at 15-16) He has not served in the military. (*Id.* at 25) He is not married, and he has been in a cohabitant relationship since 2018. (*Id.* at 27) He does not have any children. (*Id.* at 28)

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

SOR ¶ 1.a alleges in March 2019 Applicant used marijuana twice while granted access to classified information. (Item 1) In his December 8, 2014 SCA, Applicant said he used marijuana about once a month during his first two years of college, and his most recent marijuana use was during Hurricane Sandy (October 22 to November 2, 2012). (Item 4 at 37) He did not hold a security clearance when he used marijuana in 2012. (*Id.*) In his 2014 SCA, he said:

I do not plan on using this drug because since then I have removed myself from that environment and no longer feel attracted to partaking in that behavior. I have realized that some of the decisions I have made in the past can negatively affect my future and my capacity to work. (*Id.*)

On March 31, 2015, an Office of Personnel Management (OPM) investigator interviewed Applicant. (Item 6) His 2015 OPM interview was consistent with his 2014 SCA. His only illegal drug use involved his use of marijuana. (*Id.* at 7) The OPM summary of interview states, "[Applicant] has no intention of any future [illegal] drug use. He is not interested in future drug use, and he realizes that using drugs can negatively affect his future and his capacity to work." (*Id.*)

In his June 7, 2019 SCA, Applicant said that he used marijuana from November 2010 to October 2012 about once a month during his first two years in college. (Item 3 at 44-45) He did not use marijuana from 2012 until March 2019. (*Id.* at 45) He used marijuana twice in March 2019 while he held a security clearance while “in a social setting after having a few drinks with some college friends who were visiting from out of state.” (*Id.*) He does not continue to associate with the college friends with whom he used marijuana. (*Id.*) He said:

I do not intend to use this drug in the future because I consider this an isolated instance and I would like to note that I am not a habitual user by any means. I am extremely remorseful of the choice that I made and it was a complete lapse of judgement. (*Id.*)

On August 21, 2019, an OPM investigator interviewed Applicant. (Item 5) His interview about Applicant’s marijuana use was consistent with his 2019 SCA. (*Id.* at 9) He said he does not intend to use marijuana in the future, and he does not associate with the people who used marijuana with him in 2019. (*Id.*) He has not tested positive for use of illegal drugs. (*Id.*) His 2019 marijuana use was while he held a security clearance. (*Id.*)

In his SOR response, Applicant described his 2019 marijuana use as “an isolated event,” and a “lapse of judgement.” (Item 2) He observed that recreational use of marijuana in his state is not prohibited by state law. (*Id.*) In July 2020, he moved to a different state. (*Id.*) He promised to comply with laws, rules, and regulations, and not to use marijuana in the future. (*Id.*)

In his FORM response, Applicant expressed remorse for his marijuana use in 2019. (FORM) On September 17, 2021, he provided a hair sample for testing, and the results from a hair follicle drug screen indicating no use of illegal drugs. (*Id.*) He said:

[H]e was unhappy with [his] career and felt there were limited opportunities for growth. [H]e was uncertain whether [he] wanted to continue working as an Engineer for a Federal Contractor . . . and [he] was planning on pursuing a career in real estate investing which meant [he] would no longer need access to classified information. (*Id.* at 1)

He subsequently decided to continue working as an engineer for a federal contractor. He is passionate about his current employment, and he has abandoned his idea about a career in real estate. (*Id.*) He proposed marriage; he is working on his master’s degree; he does not associate with marijuana users; and he endeavors to be the best possible employee. (*Id.* at 1-2)

Applicant’s manager, coworkers, and friends described him as professional, innovative, diligent, honest, trustworthy, loyalty, mature, knowledgeable, and reliable. (FORM) They did not observe Applicant’s impairment at work. (*Id.*) He is an asset to his employer. (*Id.*) He received an annual pay raise of over \$4,000 on May 25, 2021. (*Id.*) He received excellent performance evaluations. (*Id.*)

## 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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 Director of National Intelligence 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 guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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 conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance. . . .”; and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.” The record establishes AG ¶¶ 25(a), 25(c), and 25(f). Additional information is contained in the mitigation section, *infra*.

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. He has made some positive lifestyle changes: moved to a different state; proposed marriage; made a commitment to his current employment and to abide by laws, rules, and regulations; begun a master's degree program; and ended his association with marijuana users. He voluntarily disclosed his marijuana possession and use on his SCA, during his OPM interview, in his SOR response, and in his FORM response. He expressed his remorse about his marijuana possession and use. He does not intend 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.

Possession of a Schedule I controlled substance is a federal criminal offense. 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 substance. 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).

The Director of National Intelligence (DNI) Memorandum ES 2014-00674, "Adherence to Federal Laws Prohibiting Marijuana Use," October 25, 2014, states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines . . . . An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

See ISCR Case No. ISCR Case No. 20-01772 (App. Bd. Sept. 14, 2021) (noting continued relevance of October 15, 2014 DNI Memorandum in the application of Guideline H for marijuana cases).

Applicant used marijuana from November 2010 to October 2012 about once a month during his first two years in college. He did not use marijuana from 2012 until March 2019. His marijuana use on two occasions in March 2019 occurred while he held a security clearance. His marijuana use before 2019 will not be used for disqualification purposes; however, it will be considered in the application of mitigating conditions and under the whole-person concept. He did not describe any drug-abuse counseling or treatment.

Applicant's most recent marijuana possession and use occurred while he held a security clearance. "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 indicated in 2014 and 2015 that he did not plan or intend to use marijuana in the future. The DOHA Appeal Board has emphasized that a failure to effectuate a previous promise not to use marijuana is an important factor in a credibility assessment because it detracts from trustworthiness. See ISCR Case No. 19-02499 at 5 (App. Bd. July 7, 2021) (reversing grant of security clearance where Applicant failed to keep promises to refrain from illegal drug use). Recently, Applicant indicated he does not plan or intend to use marijuana in the future; however, I have lingering concerns about his future marijuana use. Guideline H security concerns are not mitigated at this time.

### **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 Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 29 years old, and he has worked for defense contractors as a mechanical engineer or an associate member staff engineer since December 2014. In 2014, he was awarded a bachelor's degree, and since 2016, he has been participating in a post-graduate education program. His manager, coworkers, and friends described him as professional, innovative, diligent, honest, trustworthy, loyalty, mature, knowledgeable, and reliable. They have not observed Applicant's impairment at work. He is an asset to his employer. He received an annual pay raise of over \$4,000 on May 25, 2021. He received excellent performance evaluations. He made several lifestyle changes that support his abstinence from future marijuana possession and use.

Applicant disclosed his marijuana possession and use on his SCAs, during his OPM interviews, in his SOR response, and in his FORM response. 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



his marijuana possession and use as recently as March 2019 while holding a security clearance. In 2014 and 2015, he indicated he did not plan or intend to use marijuana in the future. He expressed these intentions in a security context. His recent expressions of his intentions not to use marijuana in the future are given less weight because of his violations of previous expressions of his plans in 2014 and 2015 not to use marijuana.

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. More time without possession and use of marijuana is necessary to establish mitigation of 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
Subparagraph 1.a:	Against 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.

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Mark Harvey  
Administrative Judge