



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



In the matter of: )  
)  
) ISCR Case No. 20-01303  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esquire, Department Counsel  
For Applicant: *Pro se*

02/24/2021

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse. Eligibility for a security clearance is denied.

**Statement of the Case**

On February 5, 2019, Applicant applied for a security clearance and submitted a Questionnaire For National Security Positions (SF 86). On August 28, 2020, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (AG) (December 10, 2016) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an unsworn statement, dated September 10, 2020, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on November 30, 2020, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on December 9, 2020. His response was due on January 8, 2021. Applicant chose not to respond to the FORM, for as of January 29, 2021, no response had been received. The case was assigned to me on January 29, 2021. The record closed on February 16, 2021.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted, with comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶ 1.a.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

#### **Background**

Applicant is a 57-year-old employee of a defense contractor. He has been serving as a principal engineer with his current employer since June 2009. He is a 1981 high school graduate, and received a bachelor's degree in 1985, as well as a master's degree in 1997. He has never served with the U.S. military. He was granted a secret clearance in 2004. Applicant was married in 1994. He has two children, born in 1996 and 1999.

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

Applicant was a recreational substance abuser whose substance of choice was marijuana – a Schedule I Controlled Substance. He used marijuana on annual camping trips with old college friends, on at least three or four occasions, from about September 2014 until at least October 2017. He reported that he generally used it for recreation while his friends were doing so, so he joined in. The marijuana relaxed him. (Item 4 – SF 86, at 31; Item 5 – Enhanced Subject Interview, at 3-4) When he used marijuana, he denied that he ever did so within 48 hours of going to work. He claims that he has no intent to use marijuana in the future. (Item 4, at 31; Item 5, at 3) Although he denied that his marijuana use occurred while he held a security clearance, he actually did so because he has held a security clearance since 2004. (Item 3, at 31-33) Although Applicant's son uses marijuana, Applicant denied ever using marijuana with him. (Item 5, at 3) Applicant

has never received treatment and counseling as a result of his illegal use of controlled substances. (Item 5, at 4)

### **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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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 and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). “Substantial evidence” is “more than a scintilla but less than a preponderance.” (See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).)

The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. 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).)

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

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 I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

## **Analysis**

### **Guideline H, Drug Involvement and Substance Misuse**

The security concern relating to the guideline for Drug Involvement and Substance Abuse 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.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which 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 (Reference H and I). 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.

The guideline notes some conditions under AG ¶ 25 that could raise security concerns in this case:

(a) any substance misuse (see above definition); and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant was admittedly a recreational substance abuser. He used marijuana, a controlled substance, on annual camping trips with old college friends, on at least three or four occasions, from about September 2014 until at least October 2017. During that entire period, he held a security clearance. AG ¶¶ 25(a) and 25(f) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

(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; and

(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.

Neither condition applies. Applicant, a security clearance holder, used marijuana during annual camping trips with old college friends on three or four occasions from September 2014 until at least October 2017. He claimed he has not used marijuana since October 2017. He did not consider his use to be regular use, and he never used it anytime within 48 hours of going to work. He stated that he will not do so again. Applicant has never received treatment and counseling as a result of his illegal use of controlled substances. Neither the circumstances of his use of marijuana, nor his claim that he will not do so again, constitutes evidence to indicate that it is unlikely to recur. To his credit, he was open about his use of marijuana when he completed his SF 86, and for that

candor, he is given credit. However, other than his acknowledgments of use, accompanied by the period of abstinence, he has provided no evidence of actions taken to overcome his marijuana problem. He has not specifically disassociated himself from his marijuana-using college friends/campers; he failed to indicate that he is avoiding the camping environment where the marijuana was used; and he has not cracked down on his marijuana-using son. Furthermore, his simple comment that he will not use marijuana again, falls short of constituting a signed statement of intent to abstain from all drug involvement and substance misuse, and acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

A person should not be held forever accountable for misconduct from the past, but in this instance, after repeated annual marijuana use while holding a security clearance, his most recent drug involvement and substance misuse was in October 2017. Continued abstinence is to be encouraged, but the relatively brief period of such abstinence is considered insufficient to conclude that the abstinence will continue. Applicant's claimed new compliance with laws, rules, and regulations, is in stark contrast to his cavalier attitude towards those same laws, rules, and regulations. His use of marijuana while holding a security clearance, despite knowing that such use was prohibited by both the Government and his employer, continues to cast doubt on his current reliability, trustworthiness, and good judgment.

### **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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (*See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

There is some evidence mitigating Applicant's conduct. Applicant is a 57-year-old employee of a defense contractor. He has been serving as a principal engineer with his current employer since June 2009. He is a 1981 high school graduate, and received a

bachelor's degree in 1985, as well as a master's degree in 1997. He was granted a secret clearance in 2004. When completing his SF 86, he was candid in acknowledging that he had used marijuana in the past. He claims that he no longer intends to use it in the future.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was admittedly a recreational substance abuser. He used marijuana, a controlled substance, on annual camping trips with old college friends, on at least three or four occasions, from about September 2014 until at least October 2017. During that entire period, he held a security clearance. Applicant has never received treatment and counseling as a result of his illegal use of controlled substances.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

### **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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ROBERT ROBINSON GALES  
Administrative Judge