



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



In the matter of: )  
)  
) ISCR Case No. 20-01569  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Kelly M. Folks, Esquire, Department Counsel  
For Applicant: *Pro se*

12/14/2021

**Decision**

GALES, Robert Robinson, Administrative Judge:

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

**Statement of the Case**

On September 5, 2017, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued her a set of interrogatories, and also asked her to verify the accuracy of an investigator’s summary of an interview. She responded to those interrogatories and verified the interview summary on an unspecified date. On October 20, 2020, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to her 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* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct) and detailed reasons why the DCSA CAF 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 a sworn statement, dated January 8, 2021, Applicant responded to the SOR and elected to have her 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 her by DOHA on September 17, 2021, and she 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, she was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to her case. Applicant received the FORM on September 24, 2021. Her response was due on October 24, 2021. She chose not to respond to the FORM, for as of November 10, 2021, no response had been received. The case was assigned to me on December 2, 2021. The record closed on November 10, 2021.

### **Request for Administrative Notice**

Department Counsel requested that I take Administrative Notice of certain unspecified facts pertaining to drugs appearing in four written submissions. She did not specify the information that was considered significant, and she did not discuss the purpose of the request. Facts are proper for Administrative Notice when they are easily verifiable by an authorized source and relevant and material to the case. In this instance, the Government relied on source information regarding drugs and drug use appearing in three sections of the United State Code (U.S.C.) and in a letter from the Director of National Intelligence. The request for Administrative Notice was unnecessary because, as an administrative judge, I am expected *sua sponte* to take notice of Federal law and DOD policies.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Requests for administrative notice may utilize authoritative information or sources from the internet. See, e.g. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (citing internet sources for numerous documents).

After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of certain facts, as set forth below in the drug involvement and substance misuse and personal conduct sections.

## Findings of Fact

In her Answer to the SOR, Applicant admitted, without comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.c.) and personal conduct (SOR ¶ 2.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 42-year-old employee of a defense contractor. She has been serving as a principal financial program analyst with her current employer since August 2014. She previously worked for other employers as a senior tax accountant (January 2012 – August 2014), senior tax analyst (October 2010 – December 2011), or tax analyst (January 2008 – October 2010). A 1997 high school graduate, she received a bachelor's degree in 2006, and she has earned additional college credits but no other degree. She has never served with the U.S. military. She has never been married. She was granted an interim secret clearance in September 2017, and has held that clearance since that time.

### Drug Involvement and Substance Misuse and Personal Conduct

During the period commencing in about January 2000, and continuing until at least April 2020, with varying frequency, Applicant was a recreational substance abuser whose substance of choice was tetrahydrocannabinol (THC), known as marijuana - a Schedule I Controlled Substance. (<https://www.deadiversion.usdoj.gov/schedules/>; 21 U.S.C. § 812 (c); Item 2 – Answer to SOR, dated January 8, 2021, at 1) She acknowledged that during the times of her admitted usage, she purchased the marijuana. (Item 5 – Response to Interrogatories, undated, at 9) In her SF 86, Applicant reported that she had used marijuana “on several occasions in the last 7 years but I currently no longer use marijuana.” She stated that she stopped using marijuana in June 2017. She explained that she used it to help her fall asleep. She also added that she did not intend to use any controlled substance in the future. (Item 3 – SF 86, dated September 5, 2017, at 39-40) However, in her subsequent Response to Interrogatories, she admitted that she resumed using marijuana in September 2017 – the same month she submitted her SF 86, and had used it two to three times per week during that specific month, with similar use occurring during January 2019 and April 2020. (Item 5, at 9)

In her SF 86, Applicant was asked if her use of the marijuana took place while possessing a security clearance, and she replied “no.” (Item 3, at 40) Her response was false, for she had admitted to using marijuana while possessing an interim security clearance which granted her access to classified and sensitive information. (Item 2, at 1)

Applicant's future intentions with respect to marijuana use have been inconsistent and somewhat ambivalent. In her SF 86, she reported that she was no longer using marijuana, and during an interview with an investigator from the U.S. Office of Personnel Management (OPM) in September 2017, she stated that she had no further intention of using marijuana again. (Item 5 – Enhanced Subject Interview, dated September 25, 2017,

at 7, attached to the Response to Interrogatories) That future intention seemingly changed, for in her Response to the Interrogatories, when asked her intentions, she replied “not sure.” (Item 5, at 9) She subsequently admitted being not sure. (Applicant’s Answer to the SOR, at 2)

As discussed by the DOHA Appeal Board, conduct not alleged in an SOR may be considered: (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive § 6.3. (See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006); (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant’s lack of candor in her SF 86 and during her OPM interview will be considered only for the five purposes listed above.

Other than consulting with health-care professionals with regard to her depression, stress, and insomnia, she has never received drug-related counseling or treatment. (Item 5, at 6)

### **Personal Conduct**

As noted above, Applicant was granted an interim secret clearance in September 2017, and has held that clearance since that time. During that same period, as well as before and after that period, she routinely purchased and used marijuana. She remains unsure if she will use marijuana in the future.

### **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);
- (c) illegal possession of a controlled substance, including. . . purchase. . . ;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant was admittedly a recreational substance abuser of a Schedule I Controlled Substance - marijuana. She frequently purchased and used marijuana for a 20-year period, until at least April 2020. During part of that period she held an interim secret clearance. Her somewhat ambivalent attitude regarding future marijuana use fails to clearly and convincingly commit herself to discontinue such misuse. AG ¶¶ 25(a), 25(c), 25(f), and 25(g) 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;

(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.

None of the mitigating conditions apply. After approximately 20 years of regular marijuana use, Applicant continued using marijuana as recently as at least April 2020. She was somewhat, but not fully, open about her use of marijuana when she completed her SF 86, and for that limited candor, she is given some credit. But, she was not fully candid. She offered no substantial evidence of actions taken to overcome those issues, such as exploring drug treatment and therapy; changing or avoiding the environment where marijuana was used; providing a signed statement of intent to abstain from all drug involvement and substance misuse, without any conditions; or evidence to support her claimed abstinence since April 2020.

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against her full history of approximately 20 years of marijuana use, the relatively brief period of one year a half of reported abstinence is considered insufficient to conclude that the abstinence will continue, especially after she acknowledged an uncertainty of her future intentions. Applicant made no statement regarding the legal status of her marijuana use. She

seemingly ignored laws, rules, and regulations regarding such use. Her use of marijuana for approximately two decades, despite the fact that such use was prohibited by both the Federal Government and government contractors, and her refusal to completely disavow future marijuana use, continue to cast doubt on her current reliability, trustworthiness, and good judgment.

### **Guideline E, Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes an example of conditions that could raise security concerns under AG ¶ 16:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

My discussions related to Applicant's drug involvement and substance misuse are adopted herein. In fact, the allegations under Guideline E are identical to the ones under Guideline H, and the credible adverse information alleged under Guideline H is sufficient for an adverse determination solely under that single guideline. In this instance, the multiplication of allegations under Guideline E added nothing to the allegations under Guideline H. In fact, that multiplication could lead to a conclusion that the Guideline H allegations might be too weak to stand without the allegations under Guideline E.



I have considered the entire record, including Applicant's admissions of the SOR allegations. Applicant did not controvert any of the Guideline H or Guideline E allegations. AG ¶ 16(e) has been established.

The guideline also includes an example of a condition under AG ¶ 17 that could mitigate security concerns arising from personal conduct. It includes:

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

The condition does not apply. While Applicant has acknowledged purchasing and using marijuana for two decades, including a lengthy period during which she held an interim security clearance, despite being aware of the Federal law, rules, and regulations, as well as with employment rules and policies, she is still unsure about future marijuana use. She has taken no positive steps or efforts to seek drug counseling or therapy. Applicant's actions under the circumstances continue to cast doubt on her 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 42-year-old employee of a defense contractor. She has been serving as a principal financial program analyst with her current employer since August 2014. She previously worked for other

employers as a senior tax accountant (January 2012 – August 2014), senior tax analyst (October 2010 – December 2011), or tax analyst (January 2008 – October 2010). A 1997 high school graduate, she received a bachelor’s degree in 2006, and she has earned additional college credits, but no other degree. She was granted an interim secret clearance in September 2017, and has held that clearance since that time. She claims that she has not used marijuana since April 2020.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was admittedly a recreational substance abuser. The fact that she held an interim secret clearance from September 2017 to the present – something that would essentially be a positive factor – in this instance became a very negative factor because of her purchase and use of marijuana during that entire period. She lacked candor in her SF 86 and during her OPM interview. She remains unsure if she will use marijuana in the future, and thus, she failed to clearly and convincingly commit herself to discontinue such misuse. She has not explored any possible drug therapy or counseling.

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 her drug involvement and substance abuse and personal conduct. 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
Subparagraphs 1.a. through 1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. through 2.c.:	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.

---

ROBERT ROBINSON GALES  
Administrative Judge