



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



In the matter of: )  
)  
) ISCR Case No. 20-02849  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andre M. Gregorian, Esq., Department Counsel  
For Applicant: *Pro se*

09/15/2022

**Decision**

HARVEY, Mark, Administrative Judge:

The statement of reasons (SOR) alleges and Applicant admitted that he possessed and used marijuana from December 2018 to November 2019 after he was granted a security clearance. He was not actually accessing classified information. 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 November 12, 2019, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On November 24, 2020, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (DCSA CAF) issued an 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. (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 Guideline H. (HE 2) On March 12, 2021, Applicant provided a response to the SOR and requested a hearing. (HE 3) On June 1, 2021, Department Counsel was ready to proceed. Processing of the case was delayed due to the COVID-19 pandemic.

On May 3, 2022, the case was assigned to me. On June 14, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for July 28, 2022. (HE 1) The hearing was held as scheduled.

Department Counsel offered four exhibits into evidence; Applicant did not offer any exhibits into evidence; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 9, 14-16; GE 1-GE 4) On August 8, 2022, 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, he admitted the SOR allegation in ¶ 1.a, and he denied the allegation in SOR ¶ 1.b. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 39-year-old information technology network architect who has worked in the same division for the same defense contractor since March 2022. (Tr. 6-7, 17; GE 1) In 2001, he graduated from high school, and he has not attended college. (Tr. 5, 17) He has never served in the military. (Tr. 5-6, 17) In 2020, he married, and he does not have any children. (Tr. 6, 18)

Applicant's current employer is sponsoring him for a security clearance. (Tr. 20) He is not currently actively working on any federal government contracts. (Tr. 20-21) He could be moved to work on a government contract in the future. (Tr. 21) He has held a security clearance for 15 years; however, he does not need a security clearance to maintain his employment. (Tr. 22, 42) There is no evidence of security violations, employee discipline, arrests, or alcohol abuse.

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

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about December 2018 to about November 2019.

SOR ¶ 1.b alleges Applicant used marijuana with varying frequency from about December 2018 to about November 2019, while granted access to classified information.

In June 2008, the DOD granted, and in February 2014, the DOD renewed Applicant's security clearance. (Tr. 21-22) From December 2018 to about November 2019, he used marijuana. He worked for the same DOD contractor during this time period. (Tr. 19; GE 1) He did not have access to classified information when he was using marijuana. (Tr. 31) He did not use marijuana on business trips or in the workplace. (Tr. 34) He needed a security clearance to have access to his employer's facility or DOD facilities on behalf of his employer; however, he did not have access to classified information. (Tr. 32-33)

Applicant's November 12, 2019 SCA asked about use of illegal drugs in the previous seven years. (Tr. 22; GE 1) Applicant voluntarily responded that he used marijuana from December 2018 to November 2019. (Tr. 23; GE 1) He explained, "Seldom, recreational use outside of work, primarily on weekends." (GE 1 at 35) As for plans of future marijuana use, he said "I do not intend to keep using now that I am actively on a government contract again and it really doesn't do much for me." (*Id.*) In his February 25, 2020 Office of Personnel Management (OPM) interview, he said he used marijuana about 20 times during this period. (GE 4 at 2) He used marijuana because he was curious about how it would affect him. (*Id.*) He does not intend to use marijuana in the future because of his employment. (*Id.*)

At his hearing, Applicant said he probably used marijuana less than 20 times. (Tr. 23) He is no longer friends with the persons who provided the marijuana to him, and he stopped associating with them about one year ago. (Tr. 24, 27-29) If marijuana is offered to Applicant, he refuses to use it. (Tr. 29)

Applicant's spouse had a marijuana prescription for pain, and her prescription has probably expired. (Tr. 40) She sometimes used marijuana with Applicant; however, she stopped using marijuana in January 2022. (Tr. 24-25, 30, 41) He is not specifically aware of the presence of marijuana or drug paraphernalia in his house. (Tr. 30-31) He did not ask her whether she had any remaining marijuana in their house. (Tr. 41)

Applicant never used marijuana before or after the period December 2018 to November 2019. (Tr. 27) Marijuana is the only illegal drug he ever used. (Tr. 26-27) He did not test positive on a urinalysis test for use of any illegal substances. He has 15 years of DOD-related employment and held a security clearance for 15 years.

Applicant was aware that marijuana use is illegal under federal law. (Tr. 22) Recreational use of marijuana is illegal in his state of residence. (Tr. 23) He knew his employer opposed marijuana use by employees, and federal contractors were not supposed to use marijuana. (Tr. 33-34) His employer did not conduct testing for illegal substances. (Tr. 35) He was aware that marijuana use might jeopardize his security clearance. (Tr. 36, 39)

## **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) and 25(c).

AG ¶ 25(f) is not established. Applicant held a security clearance; however, he did not actually have access to classified information. ISCR Case No. 20-03111 (App. Bd. Aug. 10, 2022) (discussing access to classified information). There is no definition in the Directive defining a sensitive position, and the evidence did not establish Applicant’s position was sensitive at the time he was possessing and using marijuana.

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 voluntarily disclosed his marijuana possession and use during the security clearance process. He has had 15 years of DOD-related employment and held a security clearance for 15 years. He indicated 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, had, completed an SCA, but did not have an approved security clearance. The Appeal Board reversed the grant of a security clearance and 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 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).

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 and disclosed his marijuana use on his SCA and in his OPM interview. He knew his marijuana possession or use or both was prohibited by state law, federal law, security clearance policies, and his employer's policy. Applicant's decisions to repeatedly possess and use marijuana is an indication he lacks "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 possessed and used marijuana less than 20 times from about December 2018 to about November 2019. He did not describe any drug-abuse counseling or treatment. At his hearing, he indicated he does not plan or intend to use illegal drugs in the future; however, I have lingering concerns about his future compliance with security rules because of his decisions to violate rules about possession and use of marijuana. 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 a 39-year-old information technology network architect who has worked for the same defense contractor in the same division since March 2022. In 2001, he graduated from high school. In 2020, he married, and he does not have any children.

Applicant's first description to security officials of his history of involvement with marijuana was on his SCA. He did not test positive on a urinalysis test, and he does not have any drug-related arrests. 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.

The evidence against grant or continuation of a security clearance is more persuasive at this time. Applicant used marijuana less than 20 times from about December 2018 to about November 2019. His marijuana possession and use while holding a security clearance, but not while being granted access to classified information, showed poor judgment. His marijuana possession and/or use violated federal and state law, security policies, and his employer's policy.

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)).



This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without possession or use of marijuana or any other conduct of security concern, and a longer track record of behavior consistent with his obligations, he may be able to demonstrate persuasive evidence of his security clearance worthiness. 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 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.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.

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Mark Harvey  
Administrative Judge