



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



In the matter of:	)	
	)	
	)	ISCR Case No. 21-02436
	)	
Applicant for Security Clearance	)	

**Appearances**

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

09/21/2022

**Decision**

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations) and Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on March 12, 2021. On December 1, 2021, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and H. The DCSA CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Applicant responded to the SOR on December 8, 2021 and requested a decision based on the administrative (written) record, without a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The Government's written brief with supporting documents, known as the file of relevant material (FORM), was submitted by Department Counsel on January 31, 2022. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, rebut, or mitigate the security concerns. Applicant received the FORM on February 15, 2022. He did not respond to the FORM, object to the Government's exhibits, or submit additional documentary evidence for my consideration. The case was assigned to me on April 12, 2022. Government Exhibits (GE) 2 and 3 are admitted into evidence without objection. GE 1 is the SOR and Applicant's Answer, which are already part of the record.

### **Findings of Fact**

Applicant is a 56-year-old process senior network systems engineer, employed by a defense contractor since 2019. He received a bachelor's degree in 1991. He married in 1994 and divorced in 2015. He remarried in 2018 and has two adult children. This is his first security clearance application.

The SOR alleges under Guideline F that Applicant filed a Chapter 7 bankruptcy in December 2015, that was discharged in 2016 (SOR ¶ 1.a). Under Guideline H, Applicant used marijuana with varying frequency from about October 2018 to present (SOR ¶ 2.a); and that he intends to continue using marijuana (SOR ¶ 2.b). Applicant admitted the SOR allegations with explanations.

Applicant explained in his Answer to the SOR, that he filed Chapter 7 bankruptcy on the advice of his attorney and by agreement in his divorce, to avoid lifetime alimony payments to his ex-spouse. As part of the divorce decree, Applicant compiled joint credit-card debts attributed to his marriage, and filed bankruptcy to extinguish the debts. The bankruptcy was discharged in in 2016, and he stated that since that time, he has never been late on a payment, never failed to make a payment when due, and successfully met all financial obligations. He does not carry significant debt and contributes regularly to savings and retirement accounts.

In 2017, Applicant was diagnosed with Crohn's disease, a progressive autoimmune disease that affects the digestive tract, and causes inflammation, pain, scarring of intestinal tissue, nutritional deficiency, and immunodeficiency. In consultation with his doctor, he began using medicinal cannabis in 2018 as a treatment that he claims has been successful. His treatment includes extracted oil cannabis capsules in 12mg doses, which he takes every evening, along with an anti-inflammatory prescription drug. Applicant believes he is now tolerant of the marijuana and he no longer experiences any physical or mental impairment from the cannabis capsules. Applicant has a state-issued medical cannabis program card that permits him to legally purchase the cannabis in his state. He intends to continue this course of treatment.

Marijuana is a Schedule I substance under the Controlled Substances Act, meaning that it has a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. Although some states within the United States have allowed the use of marijuana for medicinal purpose, it is the U.S. Food and Drug Administration that has the federal authority to approve drugs for medicinal use in the U.S. To date, the FDA has not approved a marketing application for any marijuana product for any clinical indication. Consistent therewith, the FDA and DEA have concluded that marijuana has no federally approved medical use for treatment in the U.S. and thus it remains as a Schedule I controlled substance under federal law. See, *U.S. Drug Enforcement Administration Fact Sheet*; [https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020\\_0.pdf](https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf).

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

### **Policies**

"[N]o 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 applicants 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 § 2.

National security eligibility 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, an administrative judge applies these guidelines 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 a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. *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, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See, e.g., ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see, AG ¶ 1(d).

## Analysis

### Guideline F: Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

(b) unwillingness to satisfy debts regardless of the ability to do so.

Applicant's admissions, and the documentary evidence in the record are sufficient to establish the disqualifying condition AG ¶ 19(b).

The following mitigating conditions under AG ¶ 20 are potentially relevant:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances.

Applicant filed Chapter 7 bankruptcy in 2015 incident to a divorce agreement and with the advice of counsel. He did so to avoid alimony payments pursuant to a divorce. Essentially, this was a financial planning maneuver that Applicant claims is common in his state to avoid a legal obligation for lifetime alimony payments in a divorce. His joint credit-card debts incurred during their marriage were included in the Chapter 7, and the bankruptcy court discharged the debts in 2016. Bankruptcy is a recognized, legal method to discharge debts. There is no evidence in the record that Applicant has incurred additional debt or has any financial problems since the bankruptcy discharge.

Applicant's past financial issues no longer cast doubt on his current reliability, trustworthiness, and good financial judgment. Overall, Applicant's financial responsibility is not questionable. AG ¶¶ 19(a) and (b) apply to mitigate this security concern.

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

The security concern for drug involvement and substance misuse 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

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

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has used medicinal marijuana since October 2018, and intends to continue using it to treat his medical condition. AG ¶¶ 25(a) and (g) apply.

AG ¶ 26 provides conditions that could mitigate security concerns. I have considered all of the mitigating conditions, and find none applicable.

Applicant has a history of medical marijuana use since 2018 by agreement with his doctor and with a state-issued medical marijuana permit. Federal law prohibits the use of marijuana, regardless of state law. The Directive and AGs clearly prohibit illegal drug use among cleared personnel and those applying for a security clearance. Applicant's intent to continue to use marijuana precludes his security eligibility. No mitigating condition applies.

### **Whole-Person Concept**

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines F and H in my whole-person analysis. I considered Applicant's admissions and explanations, along with the medical record and state medical marijuana card attached. Applicant was straightforward and honest about his use of medical marijuana and the reasons for its use. However, marijuana remains illegal under Federal law and for cleared individuals.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

## Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as amended, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: Subparagraph 1.a:	FOR APPLICANT For Applicant
Paragraph 2, Guideline H: Subparagraphs 2.a and 2.b:	AGAINST APPLICANT Against Applicant

## Conclusion

I conclude that it is not clearly consistent with the national security interest of the United States to grant Applicant's eligibility for access to classified information. Applicant's security clearance is denied.

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Gregg A. Cervi  
Administrative Judge