



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



In the matter of:	)	
	)	
	)	ISCR Case No. 21-00152
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: *Pro se*

09/20/2022

\_\_\_\_\_

**Decision**

\_\_\_\_\_

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On March 31, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. The DCSA CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR with an undated response, and requested a hearing. The case was assigned to me on May 4, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 19, 2022, and the hearing was held as scheduled on June 15, 2022. The Government offered exhibits (GE) 1-3, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A-G, which were admitted into evidence without objection. (Note: at the hearing, I misidentified AE G as Applicant's 2017 performance appraisal when it is actually an email from December 2020, which recognizes outstanding support given by Applicant to a customer.) DOHA received the hearing transcript (Tr.) on June 27, 2022.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted all of the Guideline H allegations, with explanations. However, his admission to SOR ¶ 1.d when considered with his explanation is essentially a denial and will be treated as such. He failed to address the Guideline E allegation by admitting or denying it. Since all the Guideline E allegations re-allege the same underlying conduct as alleged under Guideline H, I will treat Applicant's Guideline H admissions/denial as applying to the Guideline E allegations. I adopt his admissions as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 46 years old. He is divorced, but currently cohabitating with his ex-wife. They have two children, ages 18 and 19. He works as a principal engineer for a software team. He has worked for his current defense contractor since 2009. He also worked for a defense contractor from 2001 to 2009. Both contractors are subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* Applicant holds a bachelor's degree. He has held a security clearance since 2003. (Tr. 16-17, 27-28; GE 1, 4)

The SOR alleged Applicant used and purchased marijuana from about January 1994 to about March 2019; that he used and purchased marijuana from about January 1994 to about March 2019, while granted access to classified information; and that he was arrested for possession of marijuana in March 1996. (SOR ¶¶ 1.a-1.e) The same allegations were cross-alleged under Guideline E (SOR ¶ 2.a). The allegations in SOR ¶¶ 1.a-1.c and 1.e are established by Applicant's security clearance application (SCA) admissions and his admissions in his SOR answer. (GE 1-2; SOR answer)

Applicant started using marijuana in approximately 1994 when he was 18 years old. He continued to use marijuana intermittently over the years while having some substantial time gaps between uses. As stated above, he first obtained a security clearance in 2003 and he admitted using marijuana numerous times from 2003 to 2006 while holding a clearance. He further admitted that he knew in 2003 that holding a security clearance and using marijuana was incompatible. He justified his use of marijuana by saying, although illegal, he did not think it was serious. He typically used marijuana in a social setting with friends. He frequently visited a friend's ranch every two to three months where he used marijuana. (Tr. 21-25; GE 1)

Applicant claimed to have stopped using marijuana for some unspecified time, but he admitted resuming his use in 2013 or 2014. He continued his use at the frequency of twice a week through 2021. His last two uses were in April 2021 and August 2021, both were after the issuance of his SOR. (Note: Applicant's two 2021 uses were not alleged in the SOR so I will not use that evidence for disqualification purposes, however, I can consider it in assessing Applicant's credibility, in determining the applicability of any mitigating conditions, and in the application of the whole-person factors.) He admitted to purchasing marijuana on occasion. He continues to associate with friends who use marijuana in his presence. Applicant denied using marijuana while granted access to classified information. The Government failed to present any evidence establishing Applicant's use of marijuana while he was granted access to classified information or when holding a sensitive position. (Tr. 27-28, 30-31; GE 1; SOR answer)

Applicant admitted to an investigator during his background investigation that he intended to continue using marijuana in the future. In his SOR answer, he confirmed his intention to continue his marijuana use. He justified his position by stating that marijuana provided him some health benefits and because it has been legalized in several states. During his hearing testimony, he stated he would not use in the future as long as it remained illegal under Federal law. (Tr. 32, 37; SOR answer)

Applicant admitted his arrest in 1994 for marijuana possession. He was charged, but the charges were later dismissed. He was required to complete community service. He has not participated in a drug evaluation or counseling. (Tr. 34-35; GE 3)

Applicant presented documentation reflecting that he was recognized by his employer as an outstanding employee. He also presented several years' worth of performance appraisals where he was rated as "exceeding expectations."

### **Policies**

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

These guidelines are not inflexible rules of law. Instead, recognizing 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. According to AG 2(a), 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 decision.

The protection of the national security is the paramount consideration. AG 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive section E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive section E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security decision.”

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an 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.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (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 used and purchased marijuana at various times between 1994 and 2019, and he was arrested for possession of marijuana in 1994. On multiple occasions he conveyed his intent to use marijuana in the future. AG ¶¶ 25(a), AG 25(c), and AG 25(g) apply.

Applicant was granted a security clearance in 2003, but there is no evidence that he was granted access to classified information or held a sensitive position when he used marijuana. Eligibility for access to classified information and the granting of access to classified information are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a “need to know.” See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022). AG ¶ 25(f) does not apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

- (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.

Applicant's intermittent use of marijuana, which spans 25 years, with multiple uses after he held a security clearance, casts doubt on his current reliability, trustworthiness, and good judgment. His two most recent uses came after his SOR was issued in March 2021. He continues to associate with friends who use marijuana. He expressed his intent to use marijuana in the future, although he somewhat tempered that expressed intent during his testimony. He has not received any drug counseling. None of the mitigating conditions under AG ¶ 26 apply.

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

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(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.

Applicant's drug involvement and substance misuse is cross-alleged under Guideline E. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation,

manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because that conduct is sufficient for an adverse determination under the drug involvement and substance misuse guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The analysis under Guideline H applies equally here. Personal conduct security concerns are not mitigated.

### **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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's years of contractor employment and his excellent employment record. However, I also considered that he used marijuana multiple times, and as recently as August 2021, while holding a security clearance even though he knew such behavior was incompatible with holding a security clearance. His continued and recent marijuana use, while holding a security clearance, demonstrates that he does not possess the reliability, trustworthiness, and good judgment to hold a security clearance.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and Guideline E, personal contact.

### **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 – 1.c, 1.e:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

---

Robert E. Coacher  
Administrative Judge