



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



In the matter of: )  
)  
) ISCR Case No. 21-02534  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Brittany C. White, Esquire, Department Counsel  
For Applicant: *Pro se*

12/19/2022

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**Decision**  
\_\_\_\_\_

GALES, Robert Robinson, Administrative Judge:

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

**Statement of the Case**

On April 1, 2021, Applicant applied for a security clearance and submitted an Application for a Security Clearance (SF 86). On May 6 and May 8, 2021, an investigator from the U.S. Office of Personnel Management (OPM) interviewed him. On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories and asked him to verify the accuracy of the investigator’s summary of his triggered enhanced subject interviews. He responded to those interrogatories and verified the interview summaries on an unspecified date. On February 11, 2022, 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* (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 April 14, 2022, Applicant responded to the SOR, and he requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on March 10, 2022. Because of the health protection protocols associated with COVID-19, hearings were essentially placed on hold. The case was assigned to me on August 17, 2022. A Notice of Microsoft Teams Video Teleconference Hearing was issued on November 8, 2022, and I convened the hearing as scheduled on November 15, 2022.

During the hearing, Government Exhibits (GE) 1 and 2 and Applicant Exhibits (AE) A through I were marked and admitted into evidence without objection. Applicant testified. The transcript (Tr.) of the hearing was received on November 28, 2022. I kept the record open to enable Applicant to supplement it, and he timely submitted one document that was marked and admitted as AE J without objection. The record closed on December 6, 2022.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted with brief comments, most of the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. and 1.b.). He failed to address the personal conduct allegation until the hearing when he denied the allegation (SOR ¶ 2.a.). Applicant's admissions and comments are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

### **Background**

Applicant is a 39-year-old employee of a defense contractor. He has been serving as a developer with his current employer since March 2021. He previously worked for other employers as an administrator (March 2017 – December 2020) or team manager (February 2007 – February 2014). He was unemployed on two occasions (February 2014 – August 2016 and January 2021 – March 2021), after he was either terminated or laid off. He chose to attend community college during both periods. A 2001 high school graduate, he is two courses short of obtaining an associate's degree. He has never served in the U.S. military. He was married in 2007, and has two children, born in 2009 and 2011. Although he denied in his SF 86 ever having been granted a security clearance, he admitted in his Answer to the SOR that he had used marijuana "after having been granted access to classified information." During the hearing, he retracted that portion of the

allegation and denied that he had ever been granted access to classified information. (Tr. at 33-34) Because of the inconsistency regarding that issue, I requested that Department Counsel obtain and submit a Joint Personnel Adjudication System (JPAS) report indicating if or when Applicant had been granted a security clearance. (Tr. at 37) No such information was submitted. In the absence of more conclusive evidence that a security clearance had ever been granted to Applicant, I have concluded that the evidence is insufficient to support any finding that he had been granted one.

### **Drug Involvement and Substance Misuse, and Personal Conduct**

Applicant presented two different scenarios regarding his history of drug involvement and substance misuse. According to his SF 86 submission, he claimed he had been training for long distance running and suffered a collapsed foot arch. He resorted to a holistic approach to his fitness, and in May 2008, he started using – “maybe a handful of times” – tetrahydrocannabinol (THC), known as marijuana – a Schedule I Controlled Substance. (<https://www.deadiversion.usdoj.gov/schedules/>; 21 U.S.C. § 812 (c)) in an attempt to mitigate his injury while avoiding any long-term side effects from pain medication. He later obtained orthotic inserts and combined with the marijuana, he corrected his arch and speeded up his recovery. (GE 1 at 41)

However, during his OPM interview on May 6, 2021, his story changed. What had previously been described as “maybe a handful of times” starting in March 2008 for medicinal purposes became “habitually . . . once per week, unknown number of times (in the several hundreds)” for nutritional and medicinal purposes. He was treated for heel pain on two verified occasions in November and December 2020 and prescribed orthotics. (AE H; AE I) He initially purchased the marijuana illegally from various individuals prior to 2021, but at some point around March 2021, he obtained a medical license to “legally” purchase marijuana. He stated that he has no plans to stop using marijuana, at least until someone at his place of employment tells him it is unacceptable to continue using it. He claimed that his supervisor and facility security officer were aware of his current use of marijuana as well as his extensive use of it in the past 13 years, but no-one indicated his marijuana use constituted any criminal offense or that it violated any employer regulations. During that interview, Applicant kept referring to his “security clearance” and the fact that he had been granted one by his employer. (GE 2 at 9-11)

Applicant initially denied ever engaging in counseling for his marijuana use and does not believe he needs such counseling. (GE 2 at 10) During the hearing, he claimed that he had contacted a substance abuse therapist to start a recovery and substance abuse program. (Tr. at 29-31) He subsequently submitted a schedule of “counseling” appointments with a counselor, without describing her background and area of expertise or the type of counseling received, indicating only that he had paid for six sessions between April 6, 2022, and May 11, 2022. (AE J)

Applicant’s most recent use of marijuana took place in January 2022. While he claimed that he does not intend to use marijuana in the future, he might do so if it is recommended by his doctor. (Tr. at 29)

Applicant claims he no longer associates with individuals who use illegal drugs.  
(Tr. at 25)

### **Character References**

Several current and former coworkers, as well as a neighbor, are highly supportive of him. Applicant has been described as exemplifying excellent character, integrity, and dependability, backed by his diligent work ethic. (AE A; AE F) He possesses out-of-the-box thinking. (AE B) He is always attentive to detail, and communicates well. (AE D) He is a team-player with a strong work ethic. (AE E)

### **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.

In addition, on December 21, 2021, the DNI issued Memorandum ES 2021-01529, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, which states in part:

. . . disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position. . . .

Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 . . . , Questionnaire for 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.

During the period commencing in about March 2008, and continuing until at least January 2022, Applicant was both a recreational and medicinal substance abuser, whose substance of choice was marijuana – a Schedule I Controlled Substance. During part of that period, there is some disputed and unverified evidence that he held an active security clearance, but in the absence of official documentary confirmation of the actual granting of a security clearance, the evidence is insufficient to conclude that he was granted a security clearance, despite his sometime beliefs that he had been granted one. He was also a purchaser of marijuana, but that is uncharged misconduct. He initially stated that he had no plans to stop using marijuana, at least until someone at his place of employment tells him it is unacceptable to continue using it, but then changed his mind and stated he no intent to use marijuana in the future. He altered his comment again and stated that while he does not intend to use marijuana in the future, he might do so if it is recommended by his doctor. Thus, his future intentions are not really convincingly clear. AG ¶¶ 25(a), 25(c), and 25(g) have been established, but 25(f) has not 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.

AG ¶ 26(b) minimally applies, but the other mitigating condition does not apply. Applicant used marijuana from about March 2008 until about January 2022 – a period of almost 14 years that purportedly ceased 11 months ago. As noted above, he gave inconsistent evolving accounts of his use of marijuana as well as his future intentions regarding the use of marijuana. His future intent is not convincingly clear. He offered an unverified claim that he no longer associates with other marijuana users. While he has seemingly participated in some type of counseling earlier this year, he failed to submit any documentation other than a scheduling calendar to specify the actual counseling with a diagnosis or prognosis. He did not provide a signed statement of intent to abstain from all drug involvement and substance misuse, without any conditions.

Unalleged conduct can be considered for certain purposes, 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 unalleged purchases of marijuana will be considered only for the five purposes listed above.

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against his full history of marijuana use, the relatively brief period of reported abstinence is considered insufficient to conclude that the abstinence will continue, especially after so many altered plans regarding the use of marijuana. Applicant's use of marijuana for such a lengthy period, despite the fact that such use was prohibited by both the Federal Government and government contractors, continues to cast doubt on his 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 cross-allegation under Guideline E refers only to the allegation under Guideline H that Applicant "used marijuana after having been granted access to classified information." As noted above, although he denied in his SF 86 ever having been granted a security clearance, he admitted in his Answer to the SOR that he had used marijuana "after having been granted access to classified information." During the hearing, he retracted that portion of the allegation and denied that he had ever been granted access to classified information. Because of the inconsistency regarding that issue, I requested that Department Counsel obtain and submit a JPAS report indicating if or when Applicant had been granted a security clearance. No such information was submitted. In the absence of more conclusive evidence that a security clearance had ever been granted to Applicant, I have concluded that the evidence is insufficient to support any finding that he had been granted one. Accordingly, AG ¶ 16(e) has not been established.

### **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 39-year-old employee of a defense contractor. He has been serving as a developer with his current employer since March 2021. He previously worked for other employers as an administrator or team manager. A 2001 high school graduate, he is two courses short of obtaining an associate's degree. To his credit, Applicant did report his use of marijuana on his SF 86 and discussed such use much more candidly with the OPM investigator. He

purportedly ceased using marijuana in January 2022. He received some type of counseling earlier this year. His character references are very supportive of his application for a security clearance.

The disqualifying evidence under the whole-person concept is more substantial. Applicant presented two different scenarios regarding his history of drug involvement and substance misuse. In his SF 86, he claimed because of a physical injury to his foot, in May 2008, he started using marijuana – a Schedule I Controlled Substance – a handful of times in an attempt to mitigate his injury while avoiding any long-term side effects from pain medication. He later obtained orthotic inserts and combined with the marijuana he corrected his arch and speeded up his recovery. However, during an interview with an investigator with OPM, his story changed. What had previously been described as “maybe a handful of times” starting in May 2008 for medicinal purposes became “habitually . . . once per week, unknown number of times (in the several hundreds)” for nutritional and medicinal purposes starting in March 2008. He was treated for heel pain on only two verified occasions much later in November and December 2020 and prescribed orthotics.

He initially stated that he had no plans to stop using marijuana, at least until someone at his place of employment tells him it is unacceptable to continue using it. He claimed that his supervisor and facility security officer were aware of his current use of marijuana as well as his extensive use of it in the past 13 years, but no one indicated his marijuana use constituted any criminal offense or that it violated any employer regulations.

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 while Applicant did mitigate his personal conduct concerns, he 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
Subparagraphs 1.a. and 1.c.:	Against Applicant
Subparagraph 1.b.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For 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