



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



In the matter of:

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ISCR Case No. 21-01023

Applicant for Security Clearance

**Appearances**

For Government: Alison O'Connell, Esquire, Department Counsel

For Applicant: *Pro se*

03/04/2022

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**Decision**

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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 April 20, 2017, and again on October 1, 2020, Applicant applied for a security clearance and submitted Questionnaires for National Security Positions (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories, and also asked him to verify the accuracy of an investigator's summary of an interview. He responded to those interrogatories and verified the interview summary on May 21, 2021. On June 23, 2021, 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 an unsworn and undated statement, Applicant responded to the SOR and elected to have his 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 him by DOHA on November 15, 2021, and he 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, he was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on December 9, 2021. His response was due on January 8, 2022. He chose not to respond to the FORM, for as of January 18, 2022, no response had been received. The case was assigned to me on February 8, 2022. The record closed on January 8, 2022.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted, without comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶ 1.a.) and personal conduct (SOR ¶¶ 2.a. and 2.b.). 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 48-year-old employee of a defense contractor. He has been serving as a senior material requirements planning (MRP) analyst with his current employer since October 1996. A 1991 high school graduate, he subsequently earned college credits but no degree. He has never served with the U.S. military. He was married in 2001, and divorced in 2007. He has been cohabiting since 2013. He was granted a secret clearance in 2017, but, in 2020, based on his history of drug involvement and substance misuse, he was denied eligibility for a continuing security clearance.

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

During the period commencing in about June 1991, when he was in high school, and continuing until at least December 2018, Applicant was initially a curious recreational substance abuser, but eventually a regular self-medicating 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, undated at 1) His use of marijuana during 2017 and 2018 occurred while he held a security clearance. His frequency of use increased to about three to four times per week in about 2012, after he sustained a back injury while snowboarding. He claimed that his use of marijuana ceased in 2019 after becoming

concerned that he was marijuana-dependent, and he sought treatment from a family counselor to help him overcome the habit he had formed. Although he claimed to have attended drug counseling in 2019, and felt the sessions were very helpful, he offered no documentation to describe the actual counseling or to verify the contention that counseling actually took place. He claims that he is no longer motivated to use marijuana, citing his health and his career. He acknowledged that during the times of his admitted usage, he purchased the marijuana either from friends or a marijuana dispensary. (Item 3 – 2020 SF 86 at 26-28; Item 3 – Enhanced Subject Interview (ESI), dated October 27, 2020, at 4-6)

## **Personal Conduct**

In his 2017 SF 86, under Section 23 – Illegal Use of drugs or Drug Activity, Applicant was asked the following question:

In the last seven (7) years, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance.

He replied “no” to the inquiry. (Item 5 – 2017 SF 86 at 27) His response was false, for he eventually admitted that he was using marijuana since June 1991. In fact, he was using marijuana when he completed his 2017 SF 86, and he continued doing so until at least December 2018. During his OPM interview, Applicant said he was not truthful in his 2017 response because he was embarrassed about it. (Item 4 – ESI at 4) As noted above, based on his false denial, Applicant was granted a secret clearance in 2017. In 2020, when his true history of drug involvement and substance misuse was revealed, he was denied eligibility for a continuing security clearance.

## **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.

As discussed by the DOHA Appeal Board, conduct not alleged in an SOR (in this case, his purchase of marijuana) 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 purchase of marijuana will be considered only for the five purposes listed above, not including any assessment of his credibility.

The guideline notes two conditions under AG ¶ 25 that could raise security concerns in this case:

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

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

During the period commencing in about June 1991, when he was in high school, and continuing until at least December 2018, Applicant was initially a curious recreational substance abuser, but eventually a regular self-medicating substance abuser, whose substance of choice was marijuana - a Schedule I Controlled Substance. During part of that period (2017 – 2018) he held a secret clearance. AG ¶¶ 25(a) and 25(f) 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; 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.

AG ¶ 26(b) minimally applies, but none of the other mitigating conditions apply. Applicant finally reported over two and one-half decades of recreational or self-medicating regular marijuana use, supposedly ceasing in about December 2018. He was finally open about his use of marijuana when he completed his 2020 SF 86, and for that candor, he is given some credit. But, he offered no substantial or verifiable evidence of actions taken to overcome his drug involvement 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 his claimed abstinence since December 2018.

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 over two and one-half decades of marijuana use, the relatively brief period of reported abstinence is considered insufficient to conclude that the abstinence will continue. Applicant made no statement regarding the legal status of his marijuana use. He seemingly ignored laws, rules, and regulations regarding such use. His use of marijuana for such a lengthy period, including the period during which he held a security clearance, despite the fact that such use was prohibited by both the Federal Government and government contractors, continue 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:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; 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. . . .

My discussions related to Applicant's drug involvement and substance misuse are adopted herein. In fact, one of the allegations under Guideline E is identical to the one 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 however, there is also the evidence that Applicant falsified material facts in his 2017 SF 86 regarding drug involvement simply because he was embarrassed about the truth. AG ¶¶ 16(a) and 16(e) have 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. Applicant has finally acknowledged using marijuana for over two and one-half decades, including a period during which he held a security clearance, despite being aware of the Federal law, rules, and regulations, as well as with employment rules and policies. Despite claiming that he had participated in drug counseling, and that he has abstained since December 2018, he has failed to furnish any verifiable documentary evidence to support those claims. Applicant's actions under the circumstances continue to cast doubt on his 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 48-year-old employee of a defense contractor. He has been serving as a senior MRP analyst with his current employer since October 1996. A 1991 high school graduate, he subsequently earned college credits but no degree. He was granted a secret clearance in 2017. He claims that he has not used marijuana since December 2018.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was admittedly a recreational and eventually a self-medicating regular marijuana abuser for over two and one-half decades (1991 – 2018). During part of that period (2017 – 2018) he held a secret clearance. The fact that he held a secret clearance would essentially be a positive factor, but in this instance, it became a very negative factor because of his purchase and use of marijuana during that period. Applicant falsified material facts in his 2017 SF 86 regarding drug involvement simply because he was embarrassed about the truth. There is no verifiable evidence of drug counseling or abstinence.

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 his 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

    Subparagraph 1.a.:                              Against Applicant

Paragraph 2, Guideline E:                      AGAINST APPLICANT

    Subparagraphs 2.a. and 2.b.:                      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.

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ROBERT ROBINSON GALES  
Administrative Judge