



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



In the matter of:	)	
	)	
	)	ISCR Case No. 22-01490
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Carroll J. Connelley, Esq., Department Counsel  
For Applicant: *Pro se*

03/21/2023

**Decision**

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under 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 October 28, 2021. On September 26, 2022, the Department of Defense sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The Department of Defense 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 adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, National Security Adjudicative Guidelines (December 10, 2016).

Applicant answered the SOR on October 4, 2022, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on November 29, 2022. On December 1, 2022, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections

and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on December 9, 2022, and did not respond. The case was assigned to me on March 8, 2023.

The SOR and the Answer are the pleadings in the case. Applicant did not include any additional evidence with his Answer. FORM Items 2 through 5 are admitted into evidence without objection.

### **Findings of Fact**

Applicant is 42 years old. He graduated high school in 2000. He married in 2008 and has four children. He has worked for his sponsor since October 2010. He is employed as an associate director of digital design. (Item 2 at 7, 12, and 17.)

In his Answer to SOR ¶¶ 1.a-1.c, Applicant admitted he used marijuana with varying frequency from about 1999 to February 2022; that he intended to continue using marijuana; and that he purchased marijuana from about 1999 to July 2021. He continued to use after filing his SCA (see page 1). (Answer, Item 2 at 44-45, and Item 3 at 4-5.)

In his Answer to SOR ¶¶ 1.d-1.f, Applicant admitted to being charged and convicted of possession of a controlled substance, cannabis, in 2001, 2002, and 2003. (Item 2 at 40-42.) In his Answer to SOR ¶ 1.g, he admitted to being charged and convicted of felony possession with the intent to distribute a controlled substance. He was placed on probation for four years. (Item 2 at 42-43 and Item 5.)

Applicant denied SOR ¶ 1.h, which alleged that in November 2013 he was charged with felony delivery of drug paraphernalia. His FBI Criminal History Record reflects he was charged with the offense. (Item 4 at 11-12.)

Applicant explained in his Answer that he “used marijuana medically, self-medicating, for relief of medical symptoms around [his] anxiety and pain.” He states he “tried many pharmaceutical options and they have all had horrible negative side effects.” He explains that “the pattern of disregard for the law comes only as a means of personal survival and not in any way contempt for [his] country or its laws.” He admitted to going to a neighboring state to obtain marijuana despite having a medical marijuana card for his home state. (Item 3 at 4.) He expresses hope in his Answer that his use will be accepted based his use of it for medical purposes.

As whole-person evidence he offers that he serves in his community as Troop Committee Chair for the Boy Scouts and how he volunteers at community events with a local club when his health permits.

### **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.

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, 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 all available and 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 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. 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 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.

## Analysis

### Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline 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.

Applicant’s admissions in his Answer to the SOR and the information in the FORM are sufficient to raise the following disqualifying condition under this guideline: AG ¶ 25:

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

(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

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

The following mitigating condition is potentially applicable:

AG ¶ 26(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.

AG ¶ 26(a) is not established. Applicant has established a long history of purchasing, possessing, and using of marijuana in violation of state and federal law. His actions raise questions about his ability or willingness to comply with laws, rules, and regulations. He has not provided a signed statement of intent to abstain from all drug involvement and substance misuse and acknowledged that any future involvement or misuse is grounds for revocation of national security. He has sought approval as a current medical marijuana user. In ISCR Case No. 14-03734 at 3 (App. Bd. Feb. 18, 2016), the

DOHA Appeal Board noted that the DNI's 2014 memorandum specifically stated that state laws permitting the use of marijuana "do not alter the existing National Security Adjudicative Guidelines[.]" The Board also observed that "DOHA proceedings are not a proper forum to debate the pros and cons of whether marijuana should be legal for some purposes, how it should be classified as a controlled substance, or the merits of DoD policy concerning drug abuse." *Id.* See also ISCR Case No. 16-00258 at fn. 1 (App. Bd. Feb. 23, 2018) ("It merits noting, however, that while several states have decriminalized marijuana or allowed its use for medical or recreational purposes, such use of marijuana remains subject to the applicable disqualifying conditions in the Directive.") Because he requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

### **Whole-Person Concept**

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 guidelines and the whole-person concept. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I considered Applicant's admissions and explanations, along with the medical explanation. Applicant's position on marijuana was clear concerning his use of medical marijuana and the reasons for its use. However, marijuana remains illegal under Federal law and for cleared individuals. After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H:                    **AGAINST APPLICANT**

Subparagraphs 1.a-1.h:      Against Applicant

**Conclusion**

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

Charles C. Hale  
Administrative Judge