



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



In the matter of:	)	
	)	
	)	ISCR Case No. 21-02926
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Kelly M. Folks, Esq., Department Counsel  
For Applicant: *Pro se*

05/10/2023

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**Decision**

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BLAZEWICK, Robert B., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H, drug involvement and substance misuse, regarding his past use of marijuana, his use of marijuana while holding a security clearance and while having access to classified materials, his current marijuana use, and his intention to continue using marijuana. Applicant’s eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on May 24, 2021. On April 13, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). DOD issued the SOR 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

When Applicant answered the SOR on June 21, 2022, he admitted all three allegations 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).

On January 17, 2023, Department Counsel submitted the Government's File of Relevant Material (FORM Items 1 and 2 are the pleadings in the case, the SOR and the Answer). Items 3 and 4 were offered as substantive evidence. Department Counsel submitted five additional references requesting administrative notice of the facts recited in them (Items 5 – 9)

The FORM was mailed to Applicant on October 25, 2022. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation. He was given 30 days from receipt of the FORM to do so. He received the FORM on November 29, 2022. He responded on December 2, 2022. He did not note any objections to the Government's proposed evidence. FORM Items 3 and 4 are admitted into evidence without objection. Furthermore, he did not object to the Government's request for administrative notice of the facts recited in Items 5 through 9. The case was assigned to me on February 21, 2023.

Items 5 through 9, of which I have taken administrative notice of the facts recited, are 21 U.S.C. § 802; 21 U.S.C. § 812; 21 U.S.C. § 813; Security Executive Agent Memorandum ES 2014-00674 Adherence to Federal Law Prohibiting Marijuana Use, Director of National Intelligence of October 25, 2014; and Security Executive Agent 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 of December 21, 2021.

### **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a - 1.c without further comment, but provided comments in his January 17, 2022, response to DOHA's interrogatories and his December 2, 2022, response to the Government's proposed evidence to the FORM. His admissions are incorporated into the 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 a 62-year-old contractor. He has been divorced twice, has one adult child, and currently lives with a long-term partner. (Item 3 at 17-19) He earned his bachelor's degree in 2004 and his master's degree in 2014. (Item 3 at 11-12) He has been employed as a contractor since 1981. (Item 3 at 12-14) He has never served in the military. (Item 3 at 15)

The allegations in the SOR concern Applicant's long-term use of marijuana from about September 1976 to about January 2022 (SOR ¶ 1.a); his use of marijuana from about April 2009 to August 2013 while granted access to classified information (SOR ¶ 1.b); and his use of marijuana from about May 2018 to January 2022 after completing his SCA on May 24, 2021, and his intention to continue to use Marijuana (SOR ¶ 1.c). [Because the SCA was submitted in May 2021, May 2018 appears to be alleged in error and should have been May 2021.]

In his interrogatory response, in which he adopted his June 2021 background interview after making corrections and clarifications, Applicant admitted using marijuana since 1976 and "on and off for over four decades, but recently once a week in accordance with a prescription." He stated he consumed infrequently when he held his clearance at a defense contractor but then stopped while he held a clearance at subsequent defense contractor. He did not state whether he had access to classified material at the time he was using and working for a contractor. He stated he stopped in 2013 after his polygraph and then resumed use sometime in 2018 when he got a prescription for medical use. He states he consumes it responsibly for anxiety and pain and that he intends to consume marijuana "legally and per the medical prescription." He stated he did not need to use marijuana and would find alternatives if his continued use would affect his employment. He has not received drug counselling or attended a drug education class. His use is evaluated by a physician. (Item 4 at 13) He has never sold it and only purchases small quantities for personal use. (Item 4 at A-2)

Applicant stated he considers "marijuana an organic, natural herb that helps [him] with anxiety and pain" and that he does not "want to use synthetic drugs." He states he consumes marijuana "responsibly, legally with a prescription and in such a way that does not compromise [his] work performance, ability to keep a secret or to be the target of espionage..." He states he would prefer to continue his use of prescription marijuana but does not wish to "forfeit a clearance over it." (Item 4 at A-3)

Applicant responded to the FORM on December 2, 2022, acknowledging "in the past that [his] occasional use of marijuana was prohibited under federal law" and states he is contrite about his objectionable behavior. He states he never used marijuana during work hours or came to work under its influence. He argues his use has no bearing on his judgement or ability to keep a secret. He requests a favorable clearance determination but notes he does "not expect a change in disposition to a favorable decision to be cleared again due to [his] continued use of marijuana." (Answer to FORM)

### **Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, "the clearly consistent standard

indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988).

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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ 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 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## **Analysis**

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

AG ¶ 24 articulates the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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 used marijuana with varying frequency, from about 1976 to December 2020. He used marijuana while working for defense contractors. He stopped for a period while working for one defense contractor until 2010, then stopped again after his polygraph in 2013. It appears he stopped use until he received a prescription for marijuana in 2018. He has continued to use marijuana and expressed his intent to continue to do so including after he submitted his May 2021 SCA.

Applicant detailed his marijuana use and intention to continue marijuana use in his May 2021 SCA, his June 2021 interview with a government investigator, his January 2022 answer to DOHA's interrogatories, and his December 2022 response to the FORM.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);
- (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's long-term use of marijuana satisfies AG ¶ 25(a), since the illegal use of marijuana, a Schedule I controlled substance under 21 U.S.C. § 812(c), constitutes substance misuse. AG ¶ 25(g) also applies. The record does not sufficiently establish the disqualifying condition in AG ¶ 25(f). Though Applicant admits the allegation in SOR ¶ 1.b, the record is unclear as to whether he fully appreciated the distinction between holding a clearance and having been granted access to classified material, and whether he admitted that he actually had access to classified material when he answered the SOR.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

(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 is grounds for revocation of national security eligibility.

Considering the evidence, none of the mitigating conditions apply. Marijuana use and possession remains prohibited under Federal law. “Medical marijuana has no special or preferred status under either the adjudicative guidelines or the new clarifying guidance. “[D]isregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information . . . .” SecEA Clarifying Guidance at 2.” ISCR Case No. 20-02974 at 5 (App. Bd. Feb 1, 2022).

The evidence establishes that Applicant knew that marijuana use was prohibited under Federal law. He used marijuana on and off for over 40 years, continued to purchase and use marijuana after applying for a security clearance, and expressed his desire to continue use. In doing so, he not only knowingly violated Federal drug laws but also disregarded security clearance eligibility standards. This behavior raises substantial questions about his judgment, reliability, and willingness to comply with laws, rules, and regulations. Viewed as a whole, his conduct raises eligibility concerns, such as poor judgment, that are broader than his marijuana use.

### **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):

- (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 guidelines 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 have incorporated my comments under Guideline H in my whole-person analysis. I conclude Applicant did not provide sufficient evidence to mitigate the security concerns about his drug involvement and substance misuse, which includes an expressed intent to continue use. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a security clearance.

### **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
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

### **Conclusion**

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

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Robert B. Blazewick  
Administrative Judge