



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



In the matter of:	)	
	)	
	)	
	)	ISCR Case No. 22-00921
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Andrea M. Corrales, Esq., Department Counsel

For Applicant: *Pro se*

**06/22/2023**

**Decision**

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Department of Defense’s intent to deny his eligibility for access to classified information. He has not mitigated the security concern raised by his drug involvement and substance misuse. Eligibility is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on May 22, 2021. The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued him a Statement of Reasons (SOR) on August 19, 2022, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. The DOD CAF 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant submitted an undated Answer to the SOR (Answer) and elected a decision on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On November 29, 2022, Department Counsel submitted the Government’s file of relevant material (FORM), including documents identified as Items 1 through 4. (Items.) Applicant was sent the FORM on December 7, 2022, and

received it on February 9, 2023. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not respond to the FORM. The SOR and the Answer (Items 1 and 2, respectively) are the pleadings in this case. Items 3 and 4 are admitted without objection. The case was assigned to me on April 28, 2023.

### **Findings of Fact**

Applicant is 32 years old, married, with two children ages four and five. (Item 3.) From September 2009 to May 2013, he went to college in State A, where he earned his bachelor's degree. From November 2013 to August 2019, he held a number of jobs in State A. From September 2019 to June 2021, he lived in State B, where he earned his graduate degree. He then returned to State A in July 2021, where he currently lives. His clearance sponsor is a federal contractor. This is his first security clearance application. (Items 3 and 4.)

The SOR alleged that Applicant purchased and used marijuana with varying frequency from March 2011 to about June 2021. (Item 1.) Applicant admitted the SOR allegations. (Item 2.) In his SCA, he elaborated on his marijuana use. He "smoked marijuana in college...[took] edibles rarely over the last couple years...[maybe] once every couple weeks." Marijuana is currently legal in State B. If marijuana is legal in State A, he "may use it in the future in a social setting." (Item 3.)

In his July 27, 2022 Personal Subject Interview (PSI), Applicant further explained his marijuana use and his intentions for future use. He confirmed the approximate dates of his past marijuana use. His statements in the PSI about future use, however, are inconsistent. On the one hand, he said he stopped using marijuana in July 2021, when he returned to State A, where marijuana is illegal. On the other hand, he said he intends to use marijuana in the future because it is legal in State A and State B. In his response to an interrogatory, he said his intent is to use "occasionally if legal in location." In response to the query "do you intend to use marijuana . . . in the future," he checked the answer "No." (Item 4.)

### **Law and Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court held, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines. These guidelines are flexible rules of law that apply together with common sense and the general factors of the whole-person concept. An administrative judge must consider all available and 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.”

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

## Discussion

### Guideline H – Drug Involvement and Substance Abuse

Under Adjudicative Guideline (AG) H, suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24 sets forth the concern in more detail below:

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.

In analyzing the facts of this case, I considered the following disqualifying conditions:

AG ¶ 25(a) any substance misuse (see above definition); and

AG ¶ 25(c) illegal possession of a controlled substance.

Applicant admitted that he purchased and used marijuana with varying frequency from March 2011 to June 2021. Facts admitted by an applicant in an answer to an SOR or in an interview require no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) (“any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof”); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) (“[a]n applicant’s admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge’s findings”).

Possession of marijuana is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>. LSD and cocaine are Schedule I and Schedule II controlled substances, respectively, under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* See <http://www.dea.gov/drug-information/drug-scheduling>.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *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*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production, and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

In this case, disqualifying conditions AG ¶¶ 25(a) and (c) apply. Applicant is under the misapprehension that state law governs the legality of marijuana purchase and use. That is incorrect. Marijuana purchase and use continue to raise national security concerns under federal law that must be mitigated. His conflicting statements in his PSI sow doubts about his intention to use marijuana in the future.

Only mitigating condition AG ¶ 26(a) potentially applies here. That condition states: “[T]he 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.” It is true that Applicant’s use of marijuana began quite some time ago, in March 2011 while he was in college. His use, however, continued with varying frequency until June 2021, just a month after he completed his SCA. A two-year period of abstinence, especially in light of his equivocal future intent, is insufficient to allay national security concerns. On these facts, mitigating condition AG ¶ 26(a) does not apply.

In reaching this conclusion, I have also carefully considered the other mitigating conditions set forth in AG ¶¶ 26(b) through (d). On their face, those mitigating conditions do not apply in this case. I find against Applicant on SOR ¶ 1.

The record raises doubts about Applicant’s reliability, trustworthiness, judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. AG

¶¶ 2(d)(1) through (9) and 2(f)(1) through (6). Accordingly, I conclude that Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline H:                      Against Applicant

Subparagraph 1.a:                                Against Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. Clearance is denied.

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Philip J. Katauskas  
Administrative Judge