



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



In the matter of: )  
)  
) ISCR Case No. 22-01748  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel  
For Applicant: Jeffrey S. Gard, Esq.

08/23/2023

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On September 19, 2022, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. The DOD acted under Executive Order (EO) 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR, through his counsel, on October 10, 2022, and requested a hearing. The case was assigned to me on February 17, 2023. The Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 10, 2023, and the hearing was held as scheduled on April 11, 2023. The Government offered exhibits (GE) 1-3, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A-D, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on May 1, 2023.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted all of the Guideline H allegations, he also listed what mitigating circumstances he believed applied to his case. I adopt his admissions as 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 31 years old. He has never married and has no children. He works as a software engineer for a defense contractor, who he has worked for since 2014. This contractor is subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* Applicant holds a bachelor's degree in computer science. He has held a security clearance since 2016. (Tr. 22-24, 34, 37, 47; GE 1)

The SOR alleged Applicant used marijuana from about 2008 to about 2013, and from about September 2020 to at least December 2021; and that he used marijuana from about September 2020 to at least December 2021, while granted access to classified information. (SOR ¶¶ 1.a-1.b) The allegations in SOR ¶¶ 1.a-1.b are established by Applicant's security clearance application (SCA) admissions, his admissions in his answers to interrogatories and his background interview, and his admissions in his SOR answer. (GE 1-3; SOR answer)

Applicant started using marijuana in 2008 when he was 17 or 18 years old. He used marijuana approximately 400 times between 2008 and 2013. Use of marijuana was illegal under state law where Applicant resided until 2012. He claimed to have stopped using marijuana in 2013 because it no longer fit his lifestyle. He began working for his current employer in 2014 and shortly thereafter completed his first SCA. He admitted his earlier use of marijuana in his 2014 SCA. He was granted a security clearance in 2016. He worked on a classified project from 2016 through approximately 2020, when he no longer worked on that project. He claimed that he did not use marijuana during this time period. He was advised by his work supervisor not to start using marijuana now that he was no longer working on a classified project. (Tr. 24-25, 31-32, 35-36, 41, 57; GE 2)

Applicant resumed using marijuana in approximately September 2020. He continued his use through approximately December 2021. He testified that he used marijuana one to three times a week. He used marijuana with his then-girlfriend, with whom he no longer associates. He stated his reason for using marijuana during this time span was to relieve stress that he was experiencing due to the isolation from friends and coworkers caused by the pandemic. He held a security clearance during this

entire period, but he clarified that he only had access to classified information from November 2021 to December 2021. He admitted knowing his employer's drug policy, which prohibited using marijuana. He was told by his employer in 2021 that it wanted him on another classified project. He was required to fill out another SCA in May 2021 and undergo a background interview in June and July 2021. He admitted using marijuana after undergoing these security clearance activities. (Tr. 25-26, 33, 38-39, 42, 44, 47, 49; GE 2)

In his SOR answer, Applicant asserted that he would not use marijuana in the future. He denied that he was dependent on marijuana. He offered evidence that on four occasions between October 2022 and February 2023, he provided urine samples that tested negative for Tetrahydrocannabinol (THC), the active ingredient in marijuana. He began seeing a therapist in June 2022. He sees her weekly. She testified that they have worked on how Applicant can better cope with anxiety and stress. She uses Cognitive Behavior Therapy as a tool to address these topics and to decrease his desire to use marijuana. She has seen improvements in him. Applicant also presented a self-administrated form for alcohol or drug abuse. While the assessment put Applicant at the risk level of "None to Low," I gave little weight to this assessment because all the information is provided by Applicant in response to "yes and no" questions. (Tr. 27, 30, 42-43, 50, 61-66; AE A-B)

Applicant's former supervisor, who worked with him on a classified project from 2016 to 2020, testified for him and offered a written statement of support. He stated that Applicant is an excellent engineer and is a trustworthy person. He is the supervisor who warned Applicant not to use marijuana after concluding his work on the classified project in 2020. He is also aware of Applicant's marijuana use after 2020 but believes he has learned from the experience and recommends him for a clearance. Applicant presented several years' worth of performance appraisals where he was rated as "exceeded or significantly exceeded" expectations." (Tr. 52-57; AE C-D)

## **Policies**

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.

Under Directive section E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive section 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 into 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 that an 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.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse; and

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

Applicant used marijuana at various times between 2008 and 2013, and at various times from September 2020 to December 2021. AG ¶ 25(a) applies.

Applicant was granted a security clearance in 2016, but he clarified in his testimony that he did not have access to classified information when he used marijuana except from November 2021 to December 2021. Eligibility for access to classified information and the granting of access to classified information are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a “need to know.” See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022). AG ¶ 25(f) applies to the period of November 2021 to December 2021.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(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.

Applicant's intermittent use of marijuana, which goes back to 2008, with numerous uses after he held a security clearance, casts doubt on his current reliability,

trustworthiness, and good judgment. His most recent use came after he completed his second SCA and background investigation, after his supervisor specifically warned him not to use marijuana, and with full knowledge of his employer's prohibition against the use of illegal drugs, including marijuana. He discontinued his association with his ex-girlfriend with whom he used marijuana, and he expressed his intent not to use marijuana in the future. However, he failed to establish a sufficient period of abstinence considering his history of resuming marijuana use after an extensive period of abstinence (2013 to 2020). None of the mitigating conditions under AG ¶ 26 fully apply.

### **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 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 guideline 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 considered Applicant's years of contractor employment, his supervisor's recommendation, his therapist's testimony, and his excellent employment record. However, I also considered that he used marijuana multiple times, and as recently as December 2021, while holding a security clearance even though he knew such behavior was incompatible with holding a security clearance. His frequent and recent marijuana use, while holding a security clearance, demonstrates that he does not possess the reliability, trustworthiness, and good judgment to hold a security clearance.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement.

## 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:	Against Applicant (substituting November 2021 for September 2021)

## Conclusion

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

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Robert E. Coacher  
Administrative Judge