



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-00350
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

10/18/2023

\_\_\_\_\_  
**Decision**  
\_\_\_\_\_

MURPHY, Braden M., Administrative Judge:

While serving in the Navy, Applicant used Tetrahydrocannabinol (THC) on several occasions between November 2021 and February 2022. He tested positive for THC and was discharged. He also has delinquent debts that he has not resolved. Security concerns alleged under Guideline H (drug involvement and substance misuse), Guideline F (financial considerations) are established. Security concerns alleged under Guideline E (personal conduct) are not established. Applicant’s eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a questionnaire for national security positions, commonly known as a security clearance application (SCA), on October 30, 2020. (Item 3) He submitted another SCA on September 6, 2022. (Item 2) On March 31, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Guideline F, and Guideline E. The 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 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8, 2017. Applicant subsequently provided an undated response to the SOR and requested a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) based on the administrative (written) record, without a hearing.

On April 28, 2023, Department Counsel submitted the Government's File of Relevant Material (FORM). The FORM included the documentary and legal support for the Government's case. This included the SOR and the Answer (combined as FORM Item 1) and six substantive exhibits (Items 2 through 7). The FORM was mailed to Applicant on or about May 3, 2023. He was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. Applicant signed for receipt of the FORM on May 18, 2023. No subsequent response from Applicant was received by DOHA, and the case was assigned to me on September 11, 2023. Applicant did not respond to the FORM, he did not submit any evidence after responding to the SOR, nor did he pose any objections to admission of the Government's evidence. Items 2 through 7 are therefore admitted without objection.

### **Findings of Fact**

Applicant admitted the drug-related allegations at SOR ¶¶ 1.a and 1.b. He admitted the delinquent debts alleged at SOR ¶¶ 2.a, 2.b, 2.d, 2.e, and 2.f. He denied SOR ¶ 2.c. He did not answer the cross-allegation at SOR ¶ 3.a, so I construe his answer as a denial. He denied the allegation of deliberate falsification of his SCA at SOR ¶ 3.b. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 26 years old. He graduated from high school in 2016. He held several jobs in retail and as a security officer until he enlisted in the Navy. He served on active duty in the Navy from February 2021 until March 2022, when he was discharged after he tested positive for THC. He was then unemployed until June 2022 when he began working for his current employer and clearance sponsor, a defense contractor. (Item 2) Applicant was married in February 2021 and divorced in June 2022. He remarried two months later, in August 2022. (Item 2)

SOR ¶ 1.a alleges that Applicant used THC "on various occasions between at least approximately November 2021 and February 2022." Applicant admitted the allegation without further comment. (Item 1) This is based on his disclosure of THC use during that timeframe on his September 2022 SCA. However, he denied knowingly consuming THC, asserting that he thought he was vaping nicotine. (Item 2 at 35)

Applicant explained in his background interview that he tested positive for THC following a routine drug test, in November 2021. (SOR ¶ 2.a) He was notified of the

positive test in February 2022. He went to “Chief’s Mast.” He was asked if he had ever been given a “blacklist” of “vape shops” he was ordered not to frequent. He denied being given such a list. He was given the list during the proceeding and recognized a vape shop he had visited. He said he purchased and ingested a substance without looking at the label. He asserted that he did not know he was ingesting THC. He was found guilty at Chief’s Mast and sent to Captain’s Mast, where he was also found guilty, on the grounds that he should have known what he was ingesting. While he said he wanted to go to court martial, Applicant chose to plead guilty and accept 45 days of restricted duty as non-judicial punishment and a general discharge under honorable conditions. (Item 2 at 34-36; Item 4 at 5-6)

Applicant adopted his background interview summary as accurate in a February 2023 interrogatory response. (Item 4) In answering further questions about his drug involvement, he denied ever using or purchasing illegal drugs, such as marijuana. He acknowledged that “despite any state laws to the contrary, marijuana use remains illegal under Federal law” and therefore if he were to be granted a clearance or public trust position, any future use of marijuana may affect his eligibility.” (Item 4) He disavowed any future intent to use THC, marijuana, or “any other drugs illegally in the future.” (Item 4 at 13) He made a similar vow on his most recent SCA. (Item 2 at 35)

The record includes several credit bureau reports (CBRs), dated November 2020, September 2022, and March 2023. (Items 5, 6, and 7), which establish the delinquent accounts alleged in the SOR under Guideline F.

The six SOR debts total \$10,803. Applicant provided no indication that any debts have been, or are being, paid. The debts are detailed as follows:

SOR ¶ 1.a (\$396) is a debt placed for collection by an insurance company. SOR ¶ 1.b (\$702) is a charged-off account with a bank. SOR ¶ 1.c (\$1,194), which Applicant denied, is a cell phone account that has been placed for collection. SOR ¶ 1.d (\$5,395) is a charged-off account with a bank. SOR ¶ 1.e (\$1,995) is a charged-off credit card account. All of these accounts are listed as past due on CBRs in September 2022 and March 2023. (Items 6, 7)

SOR ¶ 1.f (\$1,121) is a credit account that has been charged off by a jeweler. (Item 6) On the March 2023 CBR, however, the account has a zero balance. (Item 7). This account is resolved.

Applicant did not disclose any delinquent debts on his SCA. (Item 2 at 39-40) In his background interview, he verified his negative answers to financial questions on his SCA and was then confronted with evidence of his various delinquencies. (Item 4 at 6) Once confronted, he agreed with the accounts. He did not recall some of them but did not dispute the listings on the credit report. He said he would look into the accounts and obtain documentation. (Item 4 at 7)

Applicant asserted in his background interview that he did not disclose the debts on his SCA because he did not understand the questions. In answering SOR ¶ 3.b, which alleges that he deliberately failed to disclose the debts when he filled out his SCA, he said, "I admit but I don't remember answering this question as I gave my agent all the account information that I had." (SOR Response)

Applicant did not respond to the Government's FORM, so no more recent information about him is available.

### **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 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 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 expresses 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.

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); and
- (b) testing positive for an illegal drug.

The Controlled Substances Act ("CSA") makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. §812(b)(1). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

In October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled "*Adherence to Federal Laws Prohibiting Marijuana Use*," (2014 DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National

Security Adjudicative Guidelines, and that Federal law supersedes state laws on this issue:

[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. . . . 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.

The DOHA Appeal Board, which I am required to follow, has cited the 2014 DNI Memo in holding that "state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016).

The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, DNI Avril D. Haynes issued a memorandum entitled, "*Security Executive 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.*" (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI Memo (at reference G) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that "under policy set forth in SEAD 4's adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual's reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations." Thus, consistent with these references, the AGs indicate that "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." (2021 DNI Memo)

Applicant tested positive for THC in November 2021 after visiting a vaping shop near his base and using a product he purchased there. He said in his background

interview that his use of THC was unknowing. SOR ¶ 1.a alleges that he used THC “on various occasions” between November 2021 and February 2022. He admitted the allegation without further comment. AG ¶¶ 25(a) and 25(b) apply. The fact that Applicant was discharged from the Navy (as noted in SOR ¶ 1.b) was a consequence of his conduct, but it is not itself disqualifying conduct under Guideline H.

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

(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 is grounds for revocation of national security eligibility.

As the 2021 DNI memo notes, relevant mitigating factors under the AGs include, but are not limited to:

frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. 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 (SF-86), Questionnaire for National Security Positions.

Applicant used THC that was contained in a product that he purchased at a vape shop near his base while serving in the Navy. He asserted that his use was unknowing and not intentional, but he was found guilty after testing positive for THC and discharged from the Navy. His use is relatively recent, as it occurred less than two years ago. He has asserted that he will not use THC or other illegal drugs again and has acknowledged specifically that marijuana use is illegal under federal law. However, having waived his right to a hearing, he is not subject to questioning about what happened, and there is no way to test the veracity of his assertions of reform and rehabilitation.

Applicant did not establish that his illegal drug use is infrequent, isolated, occurred under such circumstances that it is unlikely to recur, or does not cast doubt on his current reliability, trustworthiness, or good judgment. He did not provide sufficient evidence to establish that he has disassociated from drug-using associates or contacts, nor that he has changed the environment where drugs were used. In short, Applicant did not provide sufficient information to apply AG ¶¶ 26(a) or 26(b) in mitigation.

## **Guideline F, Financial Considerations**

The security concern relating to the guideline for financial considerations is set out, in relevant part, in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has incurred several delinquent debts, totaling about \$10,000. AG ¶¶ 19(a) and 19(c) apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business



downturn, unexpected medical emergency, or a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant did not provide sufficient information to mitigate the security concerns shown by his various delinquent debts. He ultimately acknowledged the debts in his background interview and admitted most of them in his SOR response. He offered no subsequent information about either the origin or resolution of the debts which might be considered in mitigation. It is his burden to set forth such evidence. Applicant needs to set forth a reasonable plan for addressing his delinquencies and then must put that plan into effect through regular payments to establish good faith. He has not yet done so. Applicant's debts are therefore unresolved, ongoing, and continue to cast doubt on his current reliability, judgment, and trustworthiness. No mitigating conditions are established by this record.

### **Guideline E, Personal Conduct**

AG ¶ 15 details the personal conduct security concern:

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. . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

SOR ¶ 3.a is merely a cross-allegation of the drug involvement allegations in SOR ¶ 1 and the delinquent debts in SOR ¶ 2. AG ¶ 16(c) is not established, as it requires “credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline. . . .” The personal conduct general concern (AG ¶ 15) is established given that Applicant’s admitted conduct establishes his questionable judgment. However, since the conduct is fully addressed under other guidelines, I consider the cross-allegation to be duplicative, and I find for Applicant on that basis.

SOR ¶ 3.b alleges that Applicant deliberately failed to disclose his six delinquent debts (SOR ¶¶ 1.a-1.f) on his September 2022 SCA. Applicant “admitted” the allegation but asserted that he did not recall answering the question, an explanation which I interpret as a denial.

In his background interview, Applicant did not acknowledge any debts until he was confronted about them. The Government has the burden of establishing allegations that the applicant denies. While the omission of the debts is shown, I do not find on this record that it is established that Applicant deliberately failed to disclose those debts on his September 2022 SCA. AG ¶ 16(a) is not established. Thus, neither SOR ¶¶ 3.a or 3.b are established as disqualifying personal conduct.

### **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 Guidelines H, F, and E in my whole-person analysis.

Applicant did not submit any evidence in response to the SOR, nor did he respond to the FORM, opportunities where he might have offered additional evidence, either in mitigation or at least explanation, either under the guidelines alleged or under the whole-person concept. He also waived his right to a hearing, so I did not have the opportunity to observe his demeanor or to assess the credibility of his assertions.

Applicant seeks a security clearance through his employment with a DOD contractor. and marijuana remains a Schedule 1 controlled substance under federal law. He used THC as recently as November 2021, while serving in the Navy – a circumstance which led to his discharge. Applicant also has delinquent debts for which he has set forth no evidence of resolution.

Applicant has not met his burden of showing that he has fully mitigated the security concerns set forth by his illegal drug use and delinquent debts in such a way as to warrant eligibility for access to classified information. 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
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a-2.e:	Against Applicant
Subparagraph 2.f:	For Applicant
Paragraph 3: Guideline E:	FOR APPLICANT
Subparagraphs 3.a-3.b:	For Applicant

### **Conclusion**

In light of all of 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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Braden M. Murphy  
Administrative Judge