



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



In the matter of: )  
)  
) ISCR Case No. 23-00240  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Karen A. Moreno-Sayles, Esq., Department Counsel  
For Applicant: *Pro se*

11/28/2023

**Decision**

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 28, 2022, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On March 2, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAS did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline H. (HE 2) On

March 21, 2023, Applicant provided a response to the SOR and requested a hearing. (HE 3) On April 20, 2023, Department Counsel was ready to proceed.

On May 26, 2023, the case was assigned to me. On June 20, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for August 11, 2023. (HE 1) The hearing was held as scheduled.

Department Counsel offered two exhibits into evidence; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 18-20; GE 1; GE 2) On August 21, 2023, DOHA received a transcript of the hearing. Applicant provided three exhibits after her hearing, which were admitted without objection (Applicant Exhibit (AE) A (one statement); AE B (nine statements), and AE C (medical statement). The record closed on September 8, 2023. (Tr. 13)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, she admitted the SOR allegation in ¶ 1.a. (HE 3) She also provided mitigating information. She provided a detailed description of her marijuana use and employment history. She expressed her regret and remorse concerning his marijuana use. Her admissions and mitigating information are accepted as findings of fact. Additional findings follow.

Applicant is a 34-year-old building operations controller, who has been employed by a government contractor since December 2022. (Tr. 8-9, 22) In 2013, she received her General Education Diploma (GED). (Tr. 8) In 2015, she received an associate degree of science specializing in automotive mechanics. (Tr. 8, 22) She has never married, and she has a 16-year-old son. (Tr. 9) She has not served in the military. (Tr. 9, 22)

### **Drug Involvement and Substance Misuse**

SOR ¶ 1.a alleges Applicant used and purchased marijuana with varying frequency from about July 2005 to about September 2022. Applicant first used marijuana when she was 16 years old. (Tr. 23) She stopped using marijuana from the age of 17 until she was about 21. (Tr. 24-25, 27) In May and July 2011, the police went to Applicant's residence on two occasions in 2011 because of alcohol-related altercations Applicant had with her boyfriend. (Tr. 31-32; AE B) She was arrested for driving under the influence of alcohol (DUI) in 2012. (Tr. 27) She enrolled in a drug and alcohol counseling program in 2012, and her first drug tests were positive for marijuana use. (Tr. 28) She received deferred adjudication for her DUI. (Tr. 28-29)

Applicant used marijuana about every four months around 2012 or 2013. (Tr. 24, 33) She stopped using marijuana from 2013 to 2016. (Tr. 34) She was fired from three jobs from 2015 to 2018; however, marijuana use was not a contributing cause of the terminations. (Tr. 34-35) In 2019 to 2020, she used marijuana about once a week, and in

2020, she reduced her marijuana usage. (Tr. 37) She did not use marijuana from December 2020 to September 2022. (Tr. 39)

In June 2022, Applicant was granted, and in July 2022, she was informed that she was granted a security clearance. (Tr. 42; SOR response at 2) Her September 13, 2022 Office of Personnel Management (OPM) summary states that in response to a question about her future marijuana use, Applicant said, “[She] intends to smoke marijuana on a rare occasion.” (Tr. 40; GE 2 at 4) Applicant said her comment to the OPM investigator was misconstrued and misunderstood, and the summary should have said in the past she smoked marijuana on a rare occasion. (Tr. 40) She used marijuana on September 10, 2022, which was one week before her OPM interview. (Tr. 41; SOR response at 2) She only took one puff on the marijuana cigarette, and she instantly regretted her marijuana use. (Tr. 42) The person who gave her the marijuana left the state where she lives. (Tr. 41) She disclosed the September 2022 marijuana use to the OPM investigator. (GE 2)

Applicant did not use any illegal drugs after September 2022. (Tr. 42) She ended her relationship and associations with persons who she knows to be marijuana users. (Tr. 42-43) The only illegal drug she has used is marijuana. (Tr. 43)

Applicant “provid[ed] 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.” (GE 2 at 14)

Applicant emphasized that she voluntarily reported her involvement with marijuana; her marijuana use is not recent; her marijuana use was not a pattern; she did not have any drug paraphernalia; and she does not intend to use marijuana in the future. (Tr. 44-45)

## **Character Evidence**

Applicant provided nine character statements including from a project leader, foreman, former supervisor, facility security officer, and other coworkers. (AE B) The general sense of her character statements is that Applicant is diligent, friendly, family oriented, dedicated, and innovative. (*Id.*) She contributes to the successes of her employers. A physician assistant who has treated her for ten years indicated she is not addicted to marijuana; she is psychologically stable; and her marijuana use was very limited and primarily when she was a teenager. (AE C) Her character evidence supports approval of her access to classified information.

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant's 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, 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 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 "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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 provides conditions that could raise a security concern and may be disqualifying in this case: "(a) any substance misuse (see above definition)"; "(c) illegal possession of a controlled substance. . . ."; and "(g) expressed intent to continue drug involvement and substance misuse." The record establishes AG ¶¶ 25(a) and 25(c). AG ¶ 25(g) is not established because Applicant said she did not express an intention to use marijuana in the future to the OPM investigator. Moreover, the SOR does not allege she intended to use marijuana in the future. Information not alleged in the SOR will not be considered for disqualification purposes.

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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;

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements,

without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

Possession of a Schedule I controlled substance is a federal criminal offense. Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance. See Drug Enforcement Administration Fact Sheet Marijuana/Cannabis at [https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020\\_0.pdf](https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf). (HE 4) See also *Gonzales v. Raich*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a "whole-person concept." This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations 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.

*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* (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

SOR ¶ 1.a alleges and Applicant admitted that she used and purchased marijuana with varying frequency from about July 2005 to about September 2022. Her decision to repeatedly possess and use marijuana is an indication she lacks the qualities expected of those with access to national secrets. She candidly said she used marijuana after completion of her SCA and grant of an interim security clearance. She used marijuana about 11 months before her security clearance hearing. She had prior periods of abstinence from marijuana possession and use from 2013 to 2016 and from 2020 to 2022.

Applicant provided some important mitigating information. She voluntarily disclosed her marijuana possession and use during the security clearance process. She disclosed her marijuana use on her SCA, during her OPM interview, in her SOR response, and during her hearing. She promised to refrain from future marijuana involvement. She provided evidence of actions taken to overcome her marijuana involvement. She disassociated from drug-using associates and contacts. She changed or avoided the environment where drugs were used. She provided 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.

I am not convinced Applicant's marijuana possession and use "happened under such circumstances that it is unlikely to recur." AG ¶ 26(a). Her marijuana involvement in September 2022 continues to "cast doubt on [her] current reliability, trustworthiness, [and] good judgment." (*Id.*) Her marijuana use is relatively recent, and she has not established a sufficient pattern of abstention from marijuana use. I have lingering concerns that she will use marijuana or violate security rules in the future. Guideline H security concerns are not mitigated at this time.

### **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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 34-year-old building operations controller, who has been employed by a government contractor since December 2022. In 2013, she received her GED. In 2015, she received an associate degree of science specializing in automotive mechanics.

Applicant provided seven character statements from coworkers. The general sense of her character statements is that Applicant is diligent, friendly, family oriented, dedicated, and innovative. She contributes to the successes of her employers. A physician assistant who has treated her for ten years said she is not addicted to marijuana; she is psychologically stable; her marijuana use was very limited; and it occurred primarily when she was a teenager. Her character evidence supports approval of her access to classified information.

Applicant candidly discussed her history of involvement with marijuana throughout the security clearance process. Her descriptions of her marijuana involvement were generally consistent. Her marijuana involvement was not discovered through law enforcement or security investigations.

The evidence against grant of a security clearance is more persuasive at this time. Applicant admitted that she possessed and used marijuana with varying frequency from about July 2005 to about September 2022. Her decisions to repeatedly possess and use marijuana is an indication she lacks the qualities expected of those with access to national secrets. She candidly said she used marijuana after completion of her SCA and grant of an interim security clearance. She used marijuana about 11 months before her security clearance hearing.

An honest and candid self-report of marijuana use is an important indication that, if granted security clearance eligibility, applicant would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. “[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant’s eligibility for access to classified information.” ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board’s jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to fully mitigate drug involvement and



substance misuse security concerns. More time without marijuana involvement is necessary to establish a pattern of abstinence and rule-following behavior.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of applicant's eligibility and suitability for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under her current circumstances, a clearance is not warranted. In the future, she may well demonstrate persuasive evidence of her security worthiness.

### **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

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge