



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



In the matter of:	)	
	)	
	)	ISCR Case No. 22-02463
	)	
Applicant for Security Clearance	)	

**Appearances**

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

12/05/2023

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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, and Guideline F, financial considerations. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On December 28, 2022, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline F. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective June 8, 2017 (AG).

Applicant answered the SOR on January 23, 2023, and requested a hearing before an administrative judge. The case was assigned to me on July 11, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 25,

2023, and the hearing was convened as scheduled on September 14, 2023. The Government offered exhibits (GE) 1-2, which were admitted into evidence without objection. The Government's discovery letter and exhibit index were marked as hearing exhibits (HE) I and II, respectively. Applicant testified but did not offer any documents into evidence. The record remained open until November 14, 2023, to allow Applicant to submit additional evidence. He did not submit any evidence. DOHA received the hearing transcript (Tr.) on September 22, 2023.

### **Findings of Fact**

In Applicant's answer, he admitted all of the SOR allegations under Guideline H, and partially admitted one allegation under Guideline F and denied the other allegation. (¶¶ 1.a-1.f, and 2.a-2.b) 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. (Item 2)

Applicant is 34 years old. He is single, never married, and has no children. He has worked as a systems manager for his current employer, a federal contractor, since July 2019. That contractor is subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* Applicant is a high school graduate who has taken some college courses. He completed a security clearance application (SCA) for his current job in February 2022. (Tr. 6, 18-20; GE 1)

The SOR alleged, under Guideline H, that Applicant:

-used and purchased marijuana, at various times, from June 2006 to about December 2022 (SOR ¶¶ 1.a-1.b);

-tested positive for illegal drugs in 2009, preventing him from enlisting in the U.S. Air Force (SOR ¶ 1.c);

-was cited by police for illegal possession of drug paraphernalia in about 2010 (SOR ¶ 1.d);

-was cited by police for illegal possession of marijuana in June 2018 (SOR ¶ 1.e); and

-resigned from his position as a police dispatcher in lieu of termination, because of his June 2018 citation for illegal possession of marijuana (SOR ¶ 1.f).

The SOR alleged, under Guideline F, that Applicant:

-failed to timely file his federal income tax returns for tax years 2016, 2017, 2018, and 2021 (SOR ¶ 2.a); and

- failed to timely file his state income tax returns for tax year 2021 (SOR ¶ 2.b).

#### **Guideline H.**

##### **Marijuana use and purchase and possession.**

Applicant admitted his marijuana use and purchases from 2006 to approximately February 2022, in his February 2022 SCA, his March 2022 personal subject interview (PSI) with an investigator, his December 2022 answers to DOHA interrogatories, and in his January 2023 SOR answer. He also admitted his positive drug test in 2009, which prevented his enlistment in the Air Force, and his citations for possession of marijuana in 2018 and possession of drug paraphernalia in 2010. During his PSI, he told an investigator that when he was using and purchasing marijuana, he knew it was illegal under federal law and against his current employer's policy. He also testified that he knew marijuana use was illegal under federal law. (Tr. 27, GE 1-2; SOR Answer)

Applicant used and purchased marijuana over the years for recreational purposes and as pain management for his back and joints. He used marijuana by smoking it and consuming edibles. He testified that he still uses marijuana on a less than regular basis. He resides in a state where marijuana is legal under state law. He testified that his most recent use of marijuana was in August 2023. He estimated that he used marijuana "less than a dozen times" from January 2023 to August 2023. (I will not use his admissions concerning his use of marijuana after April 2022, as alleged in the SOR, for disqualification purposes, but I may use this information in assessing mitigation and in my whole-person analysis) (Tr. 20, 25, 30) He was asked if he planned on continuing to use marijuana in the future, and he responded as follows:

It's very possible. I mean, if I go with this, if I get approved for this, I will definitely not be smoking until it's legalized federally. (Tr. 27)

#### **Guideline F.**

##### **Federal and State Tax Return Filings.**

In his SOR answer, Applicant admitted that he failed to timely file his 2017-2018 federal income tax returns. He claimed he was unaware of not filing his 2016 federal return in a timely manner, and he claimed he filed an extension for his 2021 federal return. He also claimed he filed an extension for his 2021 state income tax return. (SOR answer)

Applicant testified that he failed to timely file his 2017 and 2018 federal tax returns. In the past, his parents always reminded him to do his taxes, but he no longer lived with them and no one reminded him to do so for these years. He did not think about his taxes again until he began the security clearance process. He claims that his federal tax returns for 2016, 2017, 2018 and 2021 have all been filed. He also claims

that his 2021 state tax return has been filed. (Tr. 20-21, 23-24) He provided some copies of tax transcripts that show the following:

**TY 2016-Federal**-No transcript provided. The record was kept open for two months, but Applicant did not submit any additional information for this tax year;

**TY 2017-Federal**-No transcript provided. He claims he received a document from the IRS stating that it was working on this year's return, but he did not provide a copy of the document. The record was kept open for two months, but Applicant did not submit any additional information for this tax year;

**TY 2018-Federal**-A transcript indicates that this return was filed in April 2022;

**TY 2021-Federal**-A transcript indicates that this return was filed in September 2022, within the allowed time frame if an extension was requested;

**TY 2021-State**-No transcript provided. The record was kept open for two months, but Applicant did not submit any additional information for this tax year. (Tr. 23, 31, 36; GE 2)

## **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 ¶ 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 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 Misuse**

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

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. Three conditions are potentially applicable in this case:

- (a) any substance misuse;
- (b) testing positive for an illegal drug; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used, purchased, and possessed marijuana and drug paraphernalia, as stated in the SOR. He also tested positive on a pre-enlistment drug test. I find that AG ¶¶ 25(a), 25(b), and 25(c) apply, except as to SOR ¶ 1.f, which does not state a disqualifying condition under Guideline H. His resignation from employment due to his drug use citation was a consequence of his drug possession and not a separate disqualifying event.

AG ¶ 26 provides conditions that could mitigate security concerns. One potentially applies 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.

Applicant began using marijuana in 2006 and his most recent use of it was in August 2023, eight months after receiving the SOR, and just one month before his hearing. He expressed an equivocal intent not to use marijuana in the future, but he did not provide a signed statement of his intent not to use or misuse drugs in the future. Applicant's long-term and very recent marijuana use, after knowing it was against federal law, casts doubt on his current reliability, trustworthiness, and good judgment. His mitigation evidence is insufficient to convince me that recurrence is unlikely. AG ¶ 26(a) does not apply.

I also note in accordance with the Director of National Intelligence's clarifying guidance letter concerning marijuana dated December 21, 2021, I have considered that the evidence here does not support mitigation because of Applicant's recent use of marijuana and his ambivalence about his future intent to use. The guidance also states that violation of federal drug law remains relevant, but not determinative, to adjudications of security clearance eligibility. (See ES 2021-01529)

## **Guideline F, Financial Considerations**

AG ¶ 18 expresses the security concern for financial considerations:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a

security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns. I have considered all of them under AG ¶ 19 and the following potentially applies:

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant failed to timely file his 2016-2018 federal income tax returns, and his 2021 state income tax return. I conclude that his 2021 federal return was filed within the timeframe for an extension. I find the above disqualifying condition is raised.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially applies:

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant claims he filed all his state and federal tax returns for 2016-2018, and 2021. With the exception of his 2021 federal return, however, he failed to provide sufficient documentation corroborating that claim. Documentation shows that his filing of his 2018 federal return was untimely. He testified that he only became concerned about his tax filings once he began the security clearance application process. He did not provide sufficient mitigation evidence to establish the full applicability of AG ¶ 20(g).

### **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 that he used marijuana as recently as August 2023. I also considered his stated intent not to use drugs in the future.

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 and substance misuse and Guideline F, financial considerations.

### **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.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant (except the language "and 2021," which I find for Applicant)
Subparagraphs 2.b:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, 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