



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-02180
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Troy L. Nussbaum, Esq., Department Counsel  
For Applicant: *Pro se*

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

HALE, Charles C., Administrative Judge:

Applicant failed to mitigate the Guideline H (Drug Involvement and Substance Misuse) security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on June 20, 2022. On September 29, 2023, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DoD 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 the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, National Security Adjudicative Guidelines (December 10, 2016).

Applicant answered the SOR on October 8, 2023, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on October 30, 2023. October 30, 2023, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections

and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM and submitted a Response dated November 13, 2023. The case was assigned to me on February 7, 2024.

The SOR and Answer (FORM Items 1 and 2) are the pleadings in the case. Applicant did not include any documentation with his Answer or Response. FORM Items 3 through 5 are admitted into evidence without objection.

### **Findings of Fact**

In Applicant's Answer to the SOR, he admitted the three allegations: SOR ¶ 1.a, that he used marijuana or other THC products with varying frequency from about 2012 to at least February 2023; SOR ¶ 1.b, that he purchased marijuana or other THC products with varying frequency from about 2012 to at least February 2023; and SOR ¶ 1.c, that he intended to continue using marijuana or other THC products in the future. In his Answer to SOR ¶¶ 1.a and 1.b he wrote, "I admit to this for medical purposes" and after SOR ¶ 1.c he added, "I admit to this for medical purposes however can discontinue use if necessary to retain security clearance." (Item 2.)

Applicant is a 38-year-old self-employed cybersecurity services provider. He has been married since 2012 and has no children. He became a naturalized citizen in August 2015. (Item 3.)

Applicant disclosed in his August 2022 security clearance interview that he had been using marijuana since 2013. He resides in a state where marijuana use is legal under state law. He had a prescription and license for its use because of a variety of medical conditions. He renews his marijuana license annually. (Item 5 at 3.) He states his usage depends on pain triggers, which occurred a few times a month. His use takes place at home, and he used a variety of forms of marijuana. He states the reason he did not disclose on his SCA that he had bought illegal drugs was because he misunderstood the question and thought since he was buying it in a state where it was legal and that he had a license and prescription he did not have to report it. (Item 5 at 4.)

In his response to Government interrogatories, Applicant said his prescription began in 2012 and his last use was in February 2023. (Item 4 at 4.) He added that he did not use marijuana unless he was in pain. (Item 4 at 4.) He said that he planned to continue to use marijuana to mitigate his pain, but he added his use could be stopped if it hindered his security clearance and he cited other medication he would use. (Item 4 at 4, 10.)

In his Response to the FORM he stated:

I am more than willing to stop consumption. Within the section of mitigating conditions, it is stated that I have not acknowledged the drug involvement or provided evidence of actions taken to overcome problematic usage. There is no reason to take any actions as I am not addicted and there is no need for a drug treatment program.

Applicant reaffirmed in his Response that he would continue consuming marijuana for pain, however, he said that there have been multiple occasions of abstinence since 2012 where he did not need to consume marijuana. He stated he was able to use alternative forms of medication if needed. (Response.)

### **Policies**

“[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

## Analysis

### Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

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.

Applicant's admission in his answer to the SOR and the information in the FORM are sufficient to raise the following disqualifying conditions:

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

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

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 listing at [http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308\\_11.htm](http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm). See also *Gonzales v. Raich*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I). [Move this up to DC discussion not MC]

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)).

The Guideline H allegations are established by the security interview and interrogatory response. AG ¶¶ 25(a) and 25 (c) apply.

The following mitigating conditions are potentially applicable:

AG ¶ 26(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

AG ¶ 26(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.

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).

AG ¶ 26(a) is not established. Applicant used marijuana after he after submitted his SCA in June 2022 and after discussing marijuana use during his background investigation in August 2022, he continued to use marijuana. The Appeal Board has "long held that applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information." ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021).

AG ¶ 26(b) is not established. Even if Applicant was unaware through his SCA that he certified on June 20, 2022, that marijuana use violates Federal drug laws and is incompatible with security clearance eligibility standards, he was aware after his background investigation interview where it was discussed. Despite that interview, he continued to consume marijuana and did not seek alternate forms of medication that he said were available in his Government interrogatory response. Applicant did not provide sufficient evidence to establish that the security concern regarding his drug involvement is mitigated.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

Charles C. Hale  
Administrative Judge