



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



In the matter of: )  
)  
) ISCR Case No. 23-01573  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minister, Esq., Department Counsel  
For Applicant: *Pro se*

04/17/2024

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**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Guideline H, drug involvement and substance misuse, the Guideline J, criminal conduct, and the Guideline F, financial considerations security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On October 2, 2023, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, J, and F. The action was taken 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) effective on June 8, 2017.

In an undated answer to the SOR Applicant elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM), and Applicant received it on December 6, 2023. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is

identified as Items 3 through 7 (Item 1 is the SOR and Item 2 is the transmittal letter). Applicant did not respond to the FORM, nor did he provide any documents, corrections, or objections to the Government's exhibits. They are admitted in evidence. The case was assigned to me on March 27, 2024.

### **Findings of Fact**

Applicant admitted the SOR allegations in ¶¶ 1.a through 1.c and 2.a. He denied the SOR allegations in ¶¶ 3.a and 3.b. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 27 years old. He attended college but did not earn a degree. He has cohabitated with his girlfriend since 2020. He has no children. He was self-employed prior to being hired by a federal contractor in July 2022. (Item 4)

As part of Applicant's in-processing to work for the federal contractor, he was required to take a drug test. He failed it when he tested positive for marijuana. (Item 5) In May 2022, Applicant completed a security clearance application (SCA). Section 23 – Illegal use of Drugs or Drug Activity requested information and stated:

We note, with reference to this section, that neither your truthful responses nor information derived from your response to this section will be used as evidence against you in a subsequent criminal proceeding. As to this particular section, this applies whether or not you are currently employed by the Federal government. The following questions pertain to the illegal use of drugs or controlled substances or drug or controlled substance activity in accordance with Federal law, even though permissible under state laws. (Item 4)

The section asked if in the past seven years Applicant had illegally used any drugs. He responded "yes" to the question. He disclosed he used marijuana that was prescribed to him by a doctor. He has used it at home at night to help him sleep. He said other methods, such as pharmaceuticals, have proven unsuccessful in helping him sleep. He has only used marijuana for medicinal purposes when he is at home. He disclosed that he intends to continue to use marijuana in the future. (Item 4)

Applicant also disclosed in his SCA that he failed to file his 2018 and 2020 federal and state income tax returns. He said he got busy, lost track of completing the tax returns and was dealing with depression. He said he was "moving forward" with resolving his tax issues.

In his August 2022 statement to a government investigator, Applicant disclosed he used marijuana from August 2015 until two days before his interview in August 2022. He had a prescription from his doctor, and he used it to help him sleep. This is the only illegal drug he uses. He stated there was a very high likelihood that he would continue to use

marijuana as it improved his quality of life as he has struggled with eating, sleeping, and anxiety. (Item 7)

Applicant also told the government investigator that he had not filed his 2018 and 2020 federal and state income tax returns. He was not aware of how much he might owe in taxes. At the time of the interview, he was researching how much he might owe and would be moving forward shortly to take care of any potential tax debt as soon as he was financially able. He reiterated that the reason he failed to file his tax returns was due to depression and unresolved issues in his life. (Item 7)

Applicant completed government interrogatories in May 2023. Questions in the interrogatories asked if he was currently using any illegal drugs or controlled substance, and he responded "yes." He was asked if he intended to use illegal drugs in the future and he responded "yes." He reported he uses marijuana daily and his last use was the day before he completed the interrogatories. He indicated that his use was legal under state law and for medicinal purposes. He reported he has been using marijuana since approximately 2016 by smoking it, and he obtains it through a licensed dispensary in his state. He reiterated that he uses it to help him sleep. He stated he ensures he uses it by a certain time at night so "I am completely sober by the time I wake up in the morning." He has not participated in any drug treatment programs. He reported his failed drug test when he was participating in his employer's new employee program. He provided a copy of his medical marijuana card and was cleared by his employer's medical department. He reported his employer has a drug use policy, and he is required to participate in random or periodic drug testing. He reported he uses marijuana in the privacy of his home and would not go to work while under the influence of marijuana. He confirmed he intends to continue using marijuana for medical purposes at the same rate. (Item 6)

In his May 2023 interrogatories, Applicant was asked to provide information about the status of his 2018 and 2020 federal and state income tax returns and to provide tax transcripts. He stated he was still waiting for his 2018 and 2020 tax transcripts to be provided by the IRS and from his state. He stated he failed to file his tax returns for these years because "life got in the way." His parents separated and he was left taking care of the family house to prepare it for sale. He said his mother and grandmother moved and he helped them. He stated, "Throughout all of this I irresponsibly neglected to file my tax return for 2018 taxes." He then stated that when his 2020 tax returns were due "life once again got in the way." He was moving to a new state and the pandemic impacted his mental health. He was also self-employed as a realtor and he lacked a mentor in a new profession, which added stress to his life. His job took a toll on his mental health. He eventually got help from a professional. He stated, "Unfortunately, I still neglected to file my 2020 tax return throughout all of these events." (Item 6)

Applicant further stated in his May 2023 interrogatories that he had most of the documents he needed to file his 2018 and 2020 tax returns and was waiting to receive a couple documents from his financial institutions. Once he received them, he would file the delinquent returns. He stated he planned to have the returns filed in the near future. He provided his 2018 and 2020 federal income tax transcripts that are dated April 11, 2023.

Both transcripts report that returns have not been filed for 2018 and 2020. A letter from his state also reports that his state returns had not been filed for 2018 and 2020. (Item 6)

In Applicant's July 2023 interrogatories, which he responded to in September 2023, he affirmed that the summary of his personal subject interview from August 2022 was accurate, except for certain employment dates, and he corrected the date he began using marijuana to August 2015. He also stated that he did not owe federal taxes to the IRS for tax year 2020.

Applicant further stated that he was currently working with a tax accountant to resolve his delinquent 2018 and 2020 tax returns. He said they were currently being prepared, and he anticipated they would be completed by August 31, 2023, at which point he would file them with the IRS and provide information to government. He then said that the tax returns were filed on September 11, 2023, and he did not owe any taxes. It is unknown why he provided two conflicting dates. He affirmed the rest of his summary of personal subject interview as accurate. He signed the interrogatories on September 12, 2023.

Applicant included tax transcripts with his September 2023 response to the interrogatories. The transcripts are from April 2023. His 2018 and 2020 transcripts report that he has failed to file the tax returns for those years. He provided a printout from the IRS website that shows as of August 29, 2023, he did not owe taxes. Applicant did not provide a response to the FORM and did not provide updated tax transcripts from the IRS and his state reflecting his tax returns were filed. (Item 7)

### **Policies**

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(c), 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 avoided drawing 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. Directive ¶ E3.1.15 states 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 as to obtaining 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 as to 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**

The security concern relating to the guideline for drug involvement and substance misuse 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse;
- (b) testing positive for an illegal drug;

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant uses, possesses, and purchases marijuana in a state where it does not violate state law. However, it is illegal under Federal law. He tested positive for marijuana when he was required to submit to drug testing by his new employer. He has expressed his intent to continue to use and purchase it marijuana in the future. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 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 to overcome the 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 being 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.

On October 25, 2014, the Director of National Intelligence (the Security Executive Agent (SecEA)) issued DNI Memorandum ES 2014-00674, "*Adherence to Federal Laws Prohibiting Marijuana Use*," which states:

[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.

On December 21, 2021, the SecEA promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications. It states in pertinent part:

[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.

Applicant plans to continue to use marijuana, despite being aware it is a violation of federal law. He used it after completing his SCA, and after his interview with a government investigator. After he received the FORM, he had a final opportunity to state that he no longer intends to use marijuana, but he did not provide a response. Applicant continues to use and purchase marijuana in violation of federal law. None of the above mitigating conditions apply.

#### **Guideline F: Financial Considerations**

The security concern relating to the guideline for financial considerations is set out 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. 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.

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 handing and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

AG ¶ 19 provides conditions that could raise security concerns. The following is potentially applicable:

(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 2018 and 2020 federal and state income tax returns. The above disqualifying condition applies.

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 persons control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and

(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 disclosed in his May 2022 SCA that he failed to file his 2018 and 2020 federal and state income tax returns. His explanation was that "life got in the way." When he was interviewed by a government investigator in August 2022, he had not yet filed his returns. He stated in his response to government interrogatories that he received in July



2023 and answered in September 2023 that he had filed the delinquent returns, and he did not owe taxes. He did not provide documentary evidence to support his tax returns have been filed. The federal tax transcript from April 2023 and a letter from his state, both indicate the returns have not been filed. He had an opportunity to provide a response to the FORM and submit documents, but he did not. Although, he attributes his failure to comply with tax rules and regulations were due to things beyond his control, he failed to show he acted responsibly under the circumstances. He apparently was able to file his 2019 tax returns, which would indicate he could have at least filed his 2018 returns.

Even if Applicant filed his past-due returns it does not preclude careful consideration of his security worthiness based on his prior behavior. ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). A security clearance adjudication is not a tax collection process. Nor is it directed toward inducing an applicant to file tax returns. Rather, it is an evaluation of an applicant's judgment and reliability. A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015); ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). If Applicant did file the returns, it was not until after he was confronted with the delinquent returns during his security background investigation.

I cannot find that future issues are unlikely to recur. Applicant's conduct casts doubt on his current reliability, trustworthiness, and good judgment. There is no evidence he has received financial counseling, nor is there documentary corroboration that his tax returns have been filed. None of the above mitigating conditions apply.

### **Guideline J: Criminal Conduct**

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31, and the following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant has used marijuana since August 2015 and continues to do so despite being aware it is a violation of federal law. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant is aware that his use of marijuana is a violation of federal law and plans to continue to use it in the future. None of the mitigating conditions 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 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 J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. August 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

Applicant failed to meet his burden of persuasion. After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant failed to mitigate the security concerns under Guideline H, drug involvement and substance misuse, Guideline J, criminal conduct 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.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge