



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-02317
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel P. O’Reilley, Esq., Department Counsel  
For Applicant: *Pro se*

04/11/2024

**Decision**

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on April 21, 2023. The Department of Defense sent him a Statement of Reasons (SOR) dated December 12, 2023, alleging security concerns under Guideline H. The Department of Defense 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 January 10, 2024, and requested a decision on the written record without a hearing. Department Counsel issued the Government’s file of relevant material (FORM) on March 7, 2024, including documents identified as Items 1 through 5. On March 11, 2024, Applicant responded by email:

With the updated FORM you sent me with [Department Counsel's] revision, I believe the package is ready to be submitted to the Administrative Judge for their final decision. I did not think of anything that I could do to the package on my behalf. Please submit the package as I have received it with the revised FORM.

The record reflects a FORM was sent February 26, 2024. Applicant's March 11, 2024 email will be considered as a Response. The case was assigned to me on April 2, 2024.

The SOR and Applicant's Answer (FORM Items 1 and 2) and his March 11, 2024 Response are the pleadings in the case. Applicant did not include any evidence with his Answer or Response. FORM Items 3 through 5 are admitted into evidence without objection.

### **Findings of Fact**

Applicant is 31 years old and has been married for four years. He earned a bachelor's degree in 2015. He has worked for his sponsor since 2016. He has never held a security clearance. (Item 3.)

In Applicant's Answer to SOR ¶¶ 1.a-1.c, he admits he grew and distributed marijuana from July 2021 to April 2023, and sold marijuana in July 2021. He denied SOR ¶ 1.d that he intended to continue to grow and distribute marijuana in the future. He states in his Answer, "I stopped growing and distributing in April 2023 once I was considered for a clearance. I do not plan to continue to grow or distribute in the future whether I am granted or denied a clearance." His initial statement in his SCA expressed his willingness to cease this activity in the future because he recognizes it is in conflict with Federal law. His Answer reflects his understanding of the importance of following Federal law. He does not consume "cannabis in any form." He disclosed he gives the product of his plants away after realizing selling the product "would look particularly bad when trying to obtain a security clearance." He did not make a profit on his sale, which occurred in July 2021. (Item 3 at 26.)

Applicant voluntarily disclosed his actions involving marijuana on his SCA. He detailed his family's background in horticulture, which led him to his hobby of growing marijuana. He candidly acknowledges he enjoys his hobby and the challenges of raising plants. (Item 3 at 25-26.) He has cooperated in the security clearance process and his Response indicates he cooperated in preparation of the revised FORM. His involvement with marijuana is limited in scope and nature. His disclosures indicate his willingness to follow state and local laws and he now acknowledges his duty to follow Federal law. He recognized his one sale of marijuana was a mistake and violated the law, so he discontinued the practice. (Item 3; Item 4; Item 5; 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 admissions in his Answer and in his SCA are sufficient to raise the following disqualifying condition under this guideline: AG ¶ 25:

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

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 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 the 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)

The following mitigating condition is potentially applicable under 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

(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.

AG ¶ 26(a) is established for SOR ¶ 1.c. The sale he disclosed happened so long ago, was so infrequent, and happened under such circumstances that it is unlikely to recur and therefore does not cast doubt on his current reliability, trustworthiness, or good judgment. SOR ¶ 1.c is mitigated by time and infrequency.

AG ¶ 26(b) is established SOR ¶¶ 1.a, 1.b, and 1.d. Applicant has never held a security clearance. He voluntarily disclosed his actions on his SCA. He fully acknowledges his past actions. He signed his Answer, which stated his intent to discontinue growing or distributing marijuana in the future whether granted or denied his security clearance. His answers on his SCA reflect his understanding that any future involvement in growing and distributing marijuana or misuse is grounds for revocation of a security clearance.

### **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). I considered Applicant's admissions and explanations, including his explanation for how he became involved in growing marijuana. Applicant's responses in his SCA and Answer regarding marijuana involvement reflect his recognition that he must discontinue growing and distributing marijuana because it remains illegal under Federal law and for cleared individuals. While he admittedly enjoys his hobby, he has clearly stated his intention to discontinue growing and distributing going forward. 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 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:           FOR APPLICANT

Subparagraphs 1.a-1.d:   For Applicant

### **Conclusion**

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

Charles C. Hale  
Administrative Judge