



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-01884
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: John G. Hannick, Esq., Department Counsel  
For Applicant: *Pro se*

08/26/2024

**Decision**

HALE, Charles C., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on February 27, 2023. The Department of Defense (DoD) sent him a Statement of Reasons (SOR) dated October 24, 2023, 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 November 27, 2023, and requested a decision on the written record without a hearing. Department Counsel issued the Government's file of relevant material (FORM) on April 24, 2024, including documents identified as Items 1

through 9. Applicant submitted a Response dated June 5, 2024. I was assigned the case on August 6, 2024.

The SOR, Applicant's Answer (FORM Items 1 and 2), and his June 5, 2024 Response are the pleadings in the case. FORM Items 3 through 9 are admitted into evidence without objection.

### **Findings of Fact**

Applicant is a 55-year-old control systems specialist who has worked for of his sponsor since 2002. He has held a security clearance since 2009. He is married, with one adult child. He holds two master's degrees. (Item 3.)

In Applicant's SOR Answer, he admits the sole allegation that he used and purchased marijuana (THC) with varying frequency from about October 2022 to about December 2022 while granted access to classified information and/or while employed in as sensitive position.

Applicant self-disclosed his drug involvement on his 2023 SCA. He listed that from October 2022 to December 2022 he tried different forms of marijuana, edibles, and vapes a total of four to five times. "The products were purchased at a state-licensed dispensary with the intent of determining if they provided any beneficial effects." He also reported his actions to his facility security officer after completing the SCA. (Item 3 at 25-27; Answer) He purchased the "products" out of state. Recreational use of marijuana in his state of residency is illegal. (Item 6.) During his security clearance interview Applicant confirmed the accuracy of this information. He also noted that marijuana use did not contribute to any problems for him, that he did not enjoy using it, that he does not associate with individuals who use drugs illegally, and that he does not want to jeopardize his career, and he has stopped using marijuana completely. (Item 9.) In his Answer stated it was his understanding at the time that marijuana use was "treated like alcohol consumption: as long as it did not impact work or other personal affairs, it was not of any consequences to [his] security clearance." He stated the products were used at home on weekends or time off away from any work or other commitments. He stopped trying the products because he found no discernable beneficial impact and he did not enjoy the taste. He offered that he was not working any classified programs at the time. (Answer.)

Applicant voluntarily disclosed his actions involving marijuana on his SCA and fully discussed them during his security clearance interview. (Item 3 at 25-27; Item 9.) He has cooperated in the security clearance process. The evidence available shows his involvement with marijuana is limited in scope and nature and that he stopped prior to his security clearance renewal. His disclosures indicate his willingness to follow federal law and his state's laws. The security clearance interview does not read consistently with a person stating an intent to use in the future, rather it appears consistent with a statement that he has no intention to use marijuana or any other illegal drug in the future. (Item 3; Item 9; Answer; 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 SCA and Answer are sufficient to raise the following disqualifying conditions under this guideline: AG ¶ 25:

(a): any substance misuse (see above definition); and

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

The following mitigating conditions are 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.a. There is no evidence in the record that Applicant understood his use to be problematic at the time and there was no evidence to the contrary. It was over a limited period, and he had stopped months prior to his SCA being submitted. The Appeal Board has noted that:

Applicants cannot be expected to be constitutional law experts or versed in the concept of Federal supremacy. The ambiguity between state and Federal drug laws and the ensuing confusion was addressed by the Security Executive Agent in December 2021 in “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” (SecEA Clarifying Guidance). Relevant to the topic of notice, the Guidance encourages employers “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 [SCA].” SecEA Guidance at 2. Implicit in this guidance is the recognition that the SCA itself no longer puts applicants on notice and that employers should affirmatively be providing notice to prospective employees. The SecEA’s guidance to employers, however, cannot be presumed to have been followed. See ISCR Case No. 23-02476 at 5 (App. Bd. May 1, 2024).

His subsequent actions after learning of the issue reflect his reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, or regulations. See ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022).

AG ¶ 26(b) is established for SOR ¶ 1.a. Applicant voluntarily disclosed his actions on his SCA. He fully acknowledges his past actions. He clearly states he will no longer use any marijuana products in the future. His Answer and Response reflects his understanding that any future involvement in marijuana 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 why he started using marijuana. Applicant's responses in his SCA, security interview, Answer, and Response regarding his marijuana involvement reflect his recognition that he must not use marijuana. 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
Subparagraph 1.a:	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