



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



In the matter of: )  
)  
) ISCR Case No. 23-01353  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Sakeena Farhath, Esq., Department Counsel  
For Applicant: *Pro se*

09/17/2024

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**Decision**

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HALE, Charles C., Administrative Judge:

Applicant mitigated the 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 September 21, 2022. The Department of Defense (DoD) sent him a Statement of Reasons (SOR) dated December 27, 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 February 17, 2024, and March 29, 2024, and requested a decision on the written record without a hearing. Department Counsel issued the Government’s file of relevant material (FORM) on April 25, 2024, including documents

identified as Items 1 through 5. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant did not submit a response. The case was assigned to me on September 4, 2024.

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

### **Findings of Fact**

Applicant is a 33-year-old employee of a defense contractor. He is a systems administrator. He served honorably in the Marine Corps from 2016 to 2020. He was granted a Secret clearance in January 2015 and signed a Nondisclosure Agreement in November 2017. He is a high school graduate and is taking college classes. He is not married and has no children. (Item 3.)

Applicant admits SOR ¶ 1.a, that he "used marijuana on at least three occasions while holding a sensitive position, i.e., one in which you held a security clearance." He stated in his Answer on February 17, 2024:

I admit I made a mistake, and it was only one occasion. I stopped after three puffs. I did not get high. I disclosed that incident. It was in-between jobs. I took a drug test for the company and did not test positive. I was briefed that it was against policy even though I was in the state of [X]. I have kept myself from people who use controlled substances, I haven't used or been around any controlled substances since. I have not been in any trouble with the law or misconduct at any job while holding a clearance. I am sincerely ashamed of my past transgression and made conscious efforts to make sure that will never happen again. I have been in the military for four years and held the security clearance outside the military for three years. [P]lease don't disregard seven years of faithful service to the Department of Defense for a transgression that I have rectified.

In response to an inquiry about his forum selection, he restated in his Answer on March 29, 2024:

I admit I used marijuana in August 2022. It was not three occasions. This incident occurred once. I took three puffs. It was not for me and I never touched it again. I regret that I have done it.

Applicant admitted to marijuana use on his September 21, 2022 SCA and in a subsequent interview with an investigator for his security clearance in January 2023. (Item 3; Item 4.) He denied the investigator's characterization that he used marijuana on at least three occasions, despite authenticating the summary for accuracy. (Item 4.) He maintains he only took "three puffs" on one occasion. (Item 2.)

Applicant told the investigator in his security clearance interview he thought because he was no longer in the military and was acting within his state laws, he could try marijuana. (Item 2; Item 3.) When his company received his SCA, his company informed him that he was in violation of federal law and was subject to the same rules as when he was in the military. He cut off his associations with the person who gave him the marijuana. (Item 4.) In his Answer and security clearance interview, he stated he used marijuana on only that one occasion, and he did not try marijuana again because it did not interest him. (Item 2; Item 4.)

Applicant voluntarily disclosed his actions involving marijuana on his SCA and discussed them during his security clearance interview. (Item 3; Item 4.) He has cooperated throughout the security clearance process. His security clearance interview and Answer reflect that he fully understands his mistake and the steps he must take to mitigate his actions such as changing who he associates with. (Item 2; Item 4.) The evidence available shows his involvement with marijuana was limited in scope and that he completely disavowed future use when he learned it was still illegal federally. His disclosures indicate his willingness to follow Federal law. (Item 3; Item 4.)

### **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);

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

(f): any illegal drug use while granted access to classified information or holding a sensitive position.

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 issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a “need to know.” See Executive Order 13526, dated December 29, 2009, at § 4.1. See ISCR Case No. 20-03111 (App. Bd. Aug 10, 2022).

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. Applicant misunderstood the permissibility of his legal use under state law and the Federal law prohibition of marijuana. After learning that the Federal prohibition was still applicable and superseding, he took sufficient action to be in compliance. 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).

Applicant’s subsequent actions after learning of his mistake 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 acknowledges his past actions while disputing the investigator’s characterization. His Answer 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, his security interview, and his prior honorable service. 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