



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



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
|                                  | ) | ISCR Case No. 23-00595 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: George Hawkins, Esq., Department Counsel  
For Applicant: Ronald Sykstus, Esq.

12/09/2024

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**Decision**

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HYAMS, Ross D., Administrative Judge:

Applicant did not provide sufficient information to mitigate the drug involvement and substance misuse and foreign influence security concerns. The criminal conduct security concerns were mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on July 6, 2022. On June 5, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse), Guideline J (criminal conduct), and Guideline B (foreign influence). Applicant answered the SOR on June 28, 2023, and requested a hearing before an administrative judge. The case was assigned to me on June 10, 2024.

The hearing convened on September 30, 2024. Department Counsel submitted Government Exhibits (GE) 1-6, which were admitted in evidence without objection. Applicant submitted Applicant Exhibits (AE) A-M, which were admitted in evidence without objection. On October 28, Applicant requested the record be reopened so that he could

submit AE N, a record of a drug test administered in 2021, which was discussed at the hearing. AE N was admitted without objection.

### **Amendment to the SOR**

At the start of the hearing, Department Counsel requested to amend SOR ¶ 2.a to correct the wording of the allegation to read:

From February 2021 through June 2021, you used marijuana while in a sensitive position, i.e., one in which you held a security clearance.

The motion to amend the SOR was granted without objection. (Tr. 8-9)

On October 1, after the hearing had concluded and the record had closed, Department Counsel moved to amend the wording of SOR ¶ 2.d. The post-hearing motion to amend the SOR was denied. Amending the pleadings after the proceedings have concluded is improper and fundamentally unfair. There was also enough information in the record to make findings on that allegation.

### **Request for Administrative Notice**

At Department Counsel's request, I took administrative notice of facts concerning Ukraine. Department Counsel provided supporting documents that verify and provide context for those facts. They are detailed in the Government's administrative notice filings in GE 3 and are included in the findings of fact.

### **Findings of Fact**

Applicant denied SOR ¶ 2.a and admitted the rest of the allegations. His admissions are incorporated into the findings of fact. Based on my review of the pleadings, evidence submitted, and testimony, I make the following additional findings of fact.

Applicant is 54 years old. He was married in 2012 and has one adult stepson. He earned a bachelor's degree in 1997. He has worked as a systems analyst for his current employer, a defense contractor, since 2021. (Tr. 14-17; GE 1)

Under Guideline H, the SOR alleges Applicant used Marijuana from February 2021 to June 2021 while in a sensitive position, and he possessed marijuana from February 2021 to June 2021 while granted access to classified information. (SOR ¶¶ 2.a, 2.c) It also alleges that Applicant purchased marijuana in February 2021 while granted access to classified information. (SOR ¶ 2.d)

Applicant has lived in State A all his life. He first obtained a security clearance in 2000 but has been working in the defense industry since 1997. In 1999, Applicant was arrested twice for DUI, one of those cases was dismissed and the other was reduced to

reckless driving. After being terminated by his employer in 2021, he made a lateral switch to his current employer. Both positions required him to possess a security clearance, because his work involves classified and sensitive information. While on leave in February 2021, he and his wife went on vacation in State B, with his sister. Marijuana is available for recreational use in State B, and his sister was a marijuana user. (Tr. 17-63; GE 1, 4, 5)

A few days before his sister arrived in State B, Applicant traveled to a local dispensary and purchased marijuana, two pipes, a grinder, and a concentrated marijuana substance called Dabs. A few days later, he made a second trip to the dispensary to purchase marijuana with his sister. He used the marijuana on his own, and with her. (Tr. 17-63)

Applicant had filed his last SCA three months prior to the marijuana use, and he was aware that marijuana use was not permitted with a security clearance. He testified he understands that even if marijuana has been legalized at the state level, it is still illegal at the federal level. (Tr. 17-68; GE 6)

At the end of the vacation in State B, Applicant placed the items he purchased at the dispensary – the pipes, grinder, dabs, and packaging in a small, zippered bag, and brought it home in his checked luggage. He claimed that he had no intent to use marijuana again, but wanted to show one of his friends how it was sold and packaged in State B. He claimed he did not realize that he had any marijuana left over in the bag. (Tr. 17-68)

Under Guideline J, SOR ¶ 1.a alleges that Applicant was arrested at a military base in June 2021 for possession of a firearm, marijuana, and drug paraphernalia. He pleaded guilty to the firearm and marijuana charges. The allegation was also cross alleged under Guideline H in SOR ¶ 2.b.

After Applicant returned from State B, he put the small, zippered bag in the passenger compartment of his car. It still contained the two pipes, grinder, Dabs, packaging, and left over product. At some point the grinder was removed from the zippered bag and remained on the floor of his car. The grinder had marijuana residue in it. He claimed he did not know how it ended up there, but asserted he was not using it to process marijuana in State A. He claimed his car was messy and cluttered, and he did not know he was driving around with the marijuana and paraphernalia. (Tr. 17-68)

In June 2021, Applicant's car was selected for a random search at the gate of the military base where he worked. A small pistol in a wallet style case was in his car under the floor mat. He possessed a valid concealed carry permit for the pistol; however, personal weapons are not permitted on base. He stated he forgot to remove it from the car. Before his car was searched, Applicant took the cased pistol and put in his back pocket to prevent it from being discovered. After police found the zippered bag with the marijuana and paraphernalia, and the grinder with marijuana residue in his car, he informed police he also had a pistol in his pocket. (Tr. 17-68; AE G)

Applicant was arrested and charged with violating a Defense Property Security Regulation for having a pistol on a military installation, possession of marijuana and drug paraphernalia. He pled guilty to the charges. He paid a \$500 fine on the gun charge and was ordered to be drug tested for a year as part of his probation. After he successfully completed the year of probation, the charges were dropped from his record because he was a first-time offender. He claimed he was pardoned by the President in November 2022, but provided no documentation supporting this claim. The gun remained in possession of police on the military base. He was drug tested and then fired by his employer after the arrest. The drug test from June 30, 2021, shows that he tested negative for illegal drugs, including marijuana. (Tr. 17-68; GE 1, 2; AE A-F, N)

Applicant's former supervisor testified. She hired him in 2015 and worked with him in a classified lab. She knows that he was terminated, and his access was revoked after his arrest. She was aware that he tested negative for drugs in June 2021 after his arrest. She was an employment reference for him in his current position. She has no concerns about him having access to classified information. She reported it was a common occurrence on base for people to be stopped with a pistol in their car because concealed carry is popular in State A. (Tr. 94-104; AE N)

Applicant provided five work performance evaluations from 2016-2019, and a signed letter that he will never use illegal drugs in the future. (AE H-M)

Under Guideline B, the SOR alleges Applicant's mother-in-law is a citizen and resident of Ukraine. (SOR ¶ 3.a)

Applicant's wife was born in Ukraine. She met him online in 2011, and they married in 2012. She became a U.S. citizen in 2019. Her mother is a senior citizen living in Ukraine, and lives on a pension. She reported that she has a close relationship with her mother and calls her about every morning. She last visited Ukraine in 2019 and is scared to travel there now because of the ongoing war. She reported that her mother lives in an area near the ongoing conflict. (Tr. 69-94)

## **Ukraine**

In GE 3, dated August 12, 2024, the Government included recent information from the U.S. Department of State about the United States' relations with Ukraine and the current conditions in that country. I take administrative notice of the facts contained in GE 3, including the following:

In February 2014, Russia's forces entered and occupied Ukraine's Crimean Peninsula. In March 2014, Russia claimed that the peninsula had become part of the Russian Federation. In February 2022, Russia escalated the conflict by invading Ukraine on several fronts. Russia had annexed numerous areas in Eastern Ukraine. This attack has become the largest conventional military attack on a sovereign state in Europe since World War II. (GE 3)

In December 2023, Russia launched its largest aerial assault on Ukraine since the start of the war. The bombardment used drones and missiles, including missiles with hypersonic capability, to strike cities and civilian infrastructure across Ukraine. There have been hundreds of thousands of deaths on both sides. Russia's defense industry has significantly ramped up production of long-range strike weapons, artillery munitions, and other capabilities that will allow it to sustain a long high-intensity war if necessary. (GE 3)

Russia's goal is to obliterate Ukraine and subjugate its people. The invasion has also created Europe's largest refugee crisis since World War II, with over six million Ukrainian refugees recorded globally. (GE 3)

The U.S. Department of State has issued a "Level 4 - Do Not Travel" warning for Ukraine due to Russia's war against Ukraine. Significant human rights abuses have been committed by Russia's forces in areas that were under Russian control. These involved severe and wide-ranging cases and included credible reports of: arbitrary or unlawful killings, including extrajudicial killings; enforced disappearance; torture and cruel, inhuman, or degrading treatment or punishment; harsh and life-threatening prison conditions; arbitrary arrest or detention; holding of political prisoners or detainees, particularly during "filtration" operations; forced separation of families; forced transfer, deportation, and wrongful adoption of Ukraine's children to Russian families; arbitrary or unlawful interference with privacy; and punishment of family members for alleged offenses by a relative. (GE 3)

There were also significant human rights issues reported involving Ukrainian government officials, although not comparable to the scope of Russia's abuses. The Ukrainian abuses included credible reports of forced disappearance; torture and cruel, inhuman, or degrading treatment or punishment; harsh and life-threatening prison conditions; and arbitrary arrest or detention. Some of these human rights issues stemmed from martial law, which continued to curtail democratic freedoms, including freedom of movement, freedom of the press, freedom of peaceful assembly, and legal protections. The government often did not take adequate steps to identify and punish officials who may have committed abuses. (GE 3)

## **Policies**

This case is adjudicated 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), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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**

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are applicable:

- (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.

The Controlled Substances Act makes it illegal under federal law to manufacture, possess, or distribute certain drugs (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, under §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment.

I have considered the mitigating conditions under AG ¶ 26. The following 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 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 is grounds for revocation of national security eligibility.

AG ¶¶ 26 (a) and (b) do not apply. Applicant knew that using marijuana while holding a security clearance, having access to classified information, and working in a sensitive position was not permitted. He had worked in the defense industry for almost two and a half decades prior to the marijuana use in State B, and he had completed an SCA three months before. Even though he had a clean drug test in June 2021, I do not find that he has no future intent to use marijuana. Four months after his trip, he was driving around with the marijuana and paraphernalia in a bag in his car, and the grinder containing residue was out of the bag and on the floor of the vehicle. Further inconsistencies in his story were revealed during cross examination. While Applicant argues his record of

service in the defense industry warrants forgiveness for making one mistake, the testimony at the hearing revealed that it was not just one mistake. The record shows it was a series of poor decisions that occurred during his vacation in State B. The bad decisions continued when he took the marijuana and paraphernalia home with him, and then transported it around in his car for months. Illegal drug use is particularly egregious because Applicant possessed a security clearance and worked in a sensitive position. This series of poor decisions continues to cast doubt on his reliability, trustworthiness, and judgment.

### **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern for criminal conduct:

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.

I have considered the disqualifying conditions for criminal conduct under AG ¶ 31 and the following is 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.

I have considered the mitigating conditions under AG ¶ 32. The following 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 asserted that the circumstances that led to his arrest were a mistake. He testified that he forgot his concealed carry pistol was in his car in a hidden location under the floor mat. He claimed that the marijuana and paraphernalia were left in his car by accident because the interior of his car was messy and cluttered. His claim about the reasons for retaining the marijuana and paraphernalia and driving around with it for months were addressed under Guideline H. I found that these things, along with his 2021 marijuana use continue to cast doubt on his reliability, trustworthiness, and judgement. That finding applies under Guideline J as well. AG ¶ 32(a) does not apply.



Applicant has not been involved in any criminal activity since June 2021. He successfully completed a year of probation, and his charges were dismissed as a first-time offender. Other than two arrests in 1999 for DUI, one which was dismissed, he does not have a pattern of involvement with criminal behavior. In this case, the facts allow me to find that the criminal conduct concerns are mitigated by the passage of time without recurrence of criminal activity. AG ¶ 32(b) applies.

### **Guideline B, Foreign Influence**

AG ¶ 6 details the security concern about “foreign contacts and interests” as follows:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

I have considered the disqualifying conditions for foreign influence under AG ¶ 7 and the following is applicable:

- (a) contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

The nature of a nation’s government, its relationship with the United States, and its human-rights record are relevant in assessing the likelihood that an applicant’s family members and foreign contacts are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member or friend is associated with or dependent upon the government, the country is known to conduct intelligence collection operations against the United States, or the foreign country is associated with a risk of terrorism. Active hostilities and ongoing military conflict in a foreign country is also of significant concern.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

A heightened security risk in Ukraine is established by the administratively noticed facts in the record. Currently, the security risks are largely created by active armed conflict with Russia. However, there are concerns about Ukraine's government and human rights record that must be considered once the conflict ends. AG ¶ 7(a) applies.

AG ¶ 8 lists conditions that could mitigate foreign influence security concerns, including:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual or infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

None of the mitigating conditions apply. Applicant's wife has close and continuing contact with her mother in Ukraine. There is a presumption that Applicant has ties of affection for and obligation to the immediate family members of his spouse, and the close bonds of affection and obligation between his wife and mother-in-law are imputed to him. While the whole country of Ukraine is affected by the war with Russia, Applicant's mother-in-law lives in an area impacted by the war. Given these facts, I do not find that it is unlikely that Applicant or his wife will be placed in a position of having to choose between the interests of a foreign individual, and the interests of the U.S. I do not find that no conflict of interest exists. Contact and communication between Applicant's wife and his mother-in-law are not casual or infrequent.

### **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 relevant 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, J, and B in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility for a security clearance. He did not provide sufficient evidence to mitigate the drug involvement and substance misuse and foreign influence security concerns. The criminal conduct security concerns are mitigated.

### **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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline J: | FOR APPLICANT     |
| Subparagraph 1.a:         | For Applicant     |
| Paragraph 2, Guideline H: | AGAINST APPLICANT |
| Subparagraphs 2.a-2.d:    | Against Applicant |
| Paragraph 3, Guideline B: | AGAINST APPLICANT |
| Subparagraph 3.a:         | Against Applicant |

### **Conclusion**

It is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Ross D. Hyams  
Administrative Judge