



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



In the matter of: )  
)  
) ISCR Case No. 23-01553  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government:  
David F. Hayes, Esquire, Department Counsel

For Applicant: *Pro se*

10/24/2024

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**Decision**

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GLENDON, John Bayard, Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse security concerns raised by the facts in this case. National security eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted his Questionnaire for National Security Positions (Questionnaire) on September 19, 2022. (Item 2.) On November 6, 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). (Item 1.) The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) effective within the Department of Defense after June 8, 2017.

On November 30, 2023, Applicant responded to the SOR in writing (Answer) and requested that his case be decided on the written record in lieu of a hearing. (Item 1.) In his Answer he admitted that SOR allegations, except that he denied an allegation that he had access to classified information during the period that he had used marijuana.

On February 1, 2024, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM), consisting of Items 1 through 3, was provided to Applicant. He received the FORM on February 9, 2024.

The third item submitted by Department Counsel is a set of interrogatories to which Applicant responded on August 29, 2023. In his responses, Applicant corrected two factual errors in the Government investigator's Report of Investigation (ROI) summarizing Applicant's background interview conducted November 17, 2022. Applicant also adopted the ROI, as corrected, acknowledging that it accurately reflected his statements to the investigator. Under the circumstances, Item 3 is fully admissible in evidence in this case.

Applicant provided no response to the FORM. The case was assigned to me on June 24, 2024. Items 1 through 3 are admitted into evidence. Based upon a review of the pleadings and exhibits, national security eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 55 years old, unmarried, and has no children. He earned a bachelor's degree in 2015. The most recent information in the record reflects that he was employed as a senior engineer by a private employer. According to Department Counsel's assertions in the FORM, Applicant is sponsored for a security clearance by a U.S. Government contractor where he is now employed as a technology engineer. Department Counsel also stated that Applicant was granted a security clearance in October 2022, but the record contains no documentary evidence supporting these factual claims. The September 2022 Questionnaire is Applicant's initial application for a security clearance. (FORM at 2; Item 2 at Sections 2, 12, 13A, 17, 18, and 25.)

### **Paragraph 1 - Guideline H, Drug Involvement and Substance Misuse**

The Government alleges in the SOR that Applicant is ineligible for clearance because he used and purchased marijuana recently and over a number of years with varying frequency.

1.a. and 1.b. Marijuana use and purchase during the period August 1987 until the present. In the Answer, Applicant admitted both allegations. Applicant denied in the Questionnaire that he had previously illegally used any drugs or controlled substances. In his background interview, he reported that he has used marijuana regularly since it became legal in his home state in about 2016 or 2017. He uses marijuana at night to help him sleep. He purchases the marijuana for about \$300 per month at legal dispensaries in

his state. He did not disclose his activities with marijuana in the Questionnaire because he thought it was “legal” during the specified preceding seven-year period. (Item 1 at 3; Item 2 at 24-25; Item 3 at 6-7.)

1.c. Use of marijuana from October 2022 to the present, while granted access to classified information. In his Answer Applicant denied this allegation stating that he does not have access to classified information. The record is otherwise silent as to whether he ever had access to classified information since he first applied for access to classified information in about 2022. (Item 1 at 3.)

1.d. Intent to continue using marijuana in the future. Applicant admitted this allegation in the Answer. In his November 2022 background interview, he stated that he does not want to stop using marijuana as a sleep aid because it works better than other alternatives such as melatonin. He further stated that he intends to continue smoking marijuana in the future to help him sleep. He also stated that he believes marijuana use is legal since it has been legalized under the laws of the state in which he resides. (Item 1 at 4; Item 3 at 6-7.)

### **Policies**

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## **Analysis**

### **Paragraph 1 - Guideline H, Drug Involvement and Substance Misuse**

The security concerns relating to the guideline for drug involvement and substance misuse are set out in AG ¶ 24, which reads as follows:

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.

AG ¶ 25 sets forth the following four conditions that could raise security concerns and may be disqualifying in this case:

- (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;

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

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

Marijuana is a Schedule I controlled substance under the Federal Controlled Substance Act, 21 U.S.C. § 802. Accordingly, it is a violation of Federal law to purchase, possess, and/or use marijuana. Applicant's admitted past and ongoing purchases and use of marijuana for years establish the potentially disqualifying conditions set forth in AG ¶¶ 25(a) and (c). His expressed intent to continue using marijuana in the future establishes concerns under AG ¶ 25(g).

Applicant's uncontradicted denial of any access to classified information since he applied for a security clearance precludes application of AG ¶ 25(f). That potentially disqualifying condition is only established if the record evidence supports the conclusion that Applicant purchased, possessed, and/or used marijuana while having actual access to classified information or holding a sensitive position. See ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023); ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022). There is no evidence in this record to contradict Applicant's denial that he had access to classified information. Also, the SOR allegation in ¶ 1.c does not state that Applicant held a sensitive position. See ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023) (having been granted a security clearance is evidence of holding a sensitive position). While it would have been possible for Department Counsel to request to amend the SOR to state an allegation under AG ¶ 25(f) that is supported by the facts, it was unnecessary to do so in light of the establishment of the SOR allegations under AG ¶ 25(a), (c), and (g). See ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023).

Since the record evidence clearly supports the application of AG ¶¶ 25(a), (c), and (g), the burden shifts to Applicant to mitigate the security concerns raised by the facts of this case.

AG ¶ 26 of this guideline provides conditions that could mitigate security concerns. I considered all the mitigating conditions under AG ¶ 26 and conclude that the following two conditions have possible application to the facts of this case:

(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 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 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.

Applicant has presented no evidence that addresses, let alone establishes, either of the above mitigating conditions. His use of marijuana is recent, frequent, and he stated his intention to continue this long-running drug involvement. His flagrant and repeated violations of Federal law cast doubt on his current reliability, trustworthiness, and good judgment. He has taken no steps to establish a pattern of abstinence from the use of marijuana in the future. Applicant has not mitigated the security concerns raised by his recent, frequent purchases and use of marijuana.

Moreover, the Bond Amendment (50 USC § 3343) prohibits any Federal agency from granting or renewing a security clearance for a covered person who is an unlawful user of a controlled substance or an addict (as defined in section 102(1) of the Controlled Substances Act (21 U.S.C. § 802)). Applicant declared that he is, and intends to continue to be, an unlawful user of a controlled substance. There is no authority under this law to grant a waiver for this prohibition on granting him a security clearance. (See *Security Executive Agent Directive 4*, Dec. 10, 2016, at Encl. 2, Appx. B.)

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for national security eligibility 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 national security 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 pertinent facts and circumstances surrounding this case. Applicant has declined to follow the requirements of Federal law with respect to purchase and use of marijuana. At his age, this raises serious concerns about his judgment and reliability. Overall, the record evidence leaves me with questions and doubts as to Applicant's present suitability for national security eligibility and a security clearance. Moreover, the Bond Amendment prohibits granting him national security eligibility while he remains an unlawful user of a controlled substance.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	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 interest to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is denied.

JOHN BAYARD GLENDON  
Administrative Judge