



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



In the matter of:

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ISCR Case No. 23-00086

Applicant for Security Clearance

**Appearances**

For Government: Rhett E. Petcher, Esq., Department Counsel  
For Applicant: *Pro Se*

05/08/2024

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**Decision**

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HESS, Stephanie C., Administrative Judge:

Applicant failed to mitigate the drug involvement concerns raised by his ongoing use of marijuana. Eligibility for access to classified information is denied.

**Procedural Issue**

Given the issues of concern in this case, at the beginning of the hearing, I provided the parties with a document prepared by the Congressional Research Service, *The Federal Status of Marijuana and the Expanding Policy Gap with States* (CRS Document.) The document states that marijuana remains illegal under federal law and the potential consequences of its use, including ineligibility for federal employment. The document is in accordance with the *Security Executive Agent 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*, (Haines Memo), signed by the Director of National Intelligence on December 21, 2021, which emphasizes that under federal law, the use of marijuana remains illegal and that individuals who hold a clearance or occupy a sensitive position are prohibited by law from using marijuana. I admitted the CRS Document into the record as Hearing Exhibit (HE) II.

**Statement of the Case**

Applicant submitted a security clearance application (e-QIP) on April 29, 2022. On January 24, 2023, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline H (Drug Involvement and Substance Misuse). The DOD acted under Executive Order (Ex. 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) effective June 8, 2017.

Applicant submitted his Answer to the SOR on February 15, 2023, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 14, 2023, and the case was assigned to me on August 11, 2023. On October 16, 2023, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for October 19, 2023. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted into evidence without objection. Applicant testified and Applicant's Exhibits (AX) A through C were admitted without objection. DOHA received the transcript (Tr.) on October 26, 2023.

### **Findings of Fact**

Applicant, 62, is a site superintendent currently employed by a defense contractor since July 2021. He married in 1983 and divorced in 1986. He remarried in 1995 and he and his wife have three adult children. (GX 1.)

Under Guideline H, the SOR alleges that Applicant used marijuana with varying frequency from approximately May 2019 until the present, that he intends to continue to use marijuana, and that he was terminated from his employment in 2019 for testing positive for marijuana in a company-administered drug test. He admits each of these allegations, stating that he has a medical-marijuana card and is prescribed marijuana by a licensed, registered physician to treat his chronic pain and insomnia. Applicant's admissions are incorporated in my findings of fact.

Applicant suffers from chronic joint and bone pain, likely due to several vehicular accidents and decades of manual labor. He also suffers from insomnia. Over the course of many years, he has been prescribed ibuprofen to treat his symptoms. However, while the ibuprofen reduced his pain, it did not alleviate it enough to prevent his insomnia. Additionally, he became concerned about the potential side effects of long-term use of prescription-dose ibuprofen, which include ulcers, internal bleeding, heart attack, stroke, and death. People with certain conditions, several of which Applicant has, are at increased risk. (AX A; Tr. 18-19.)

In May 2018, after his state of residence legalized medical marijuana use, Applicant met with a physician who determined that marijuana would likely be helpful to Applicant as part of his pain-management treatment. He received his first medical marijuana card and purchased medical marijuana at an authorized dispensary. He uses medical marijuana on a daily basis for pain management and sleep enhancement, only in his home. He does not use marijuana recreationally and he has never gone to work while

under the influence of marijuana. He spends approximately \$100 per week on marijuana. He also continues to use ibuprofen, but because of the pain relief and sleep-enhancing effect of the marijuana, has reduced taking it three times a day as prescribed, to twice a day. (Tr. 27-31; GX 2; Tr. 19; Tr. 31.)

In March 2019, Applicant was terminated from his job that he started November 2015 after testing positive for marijuana on a drug test. He was aware that use of marijuana was a violation of company policy that could result in termination. He was also aware that the company administered random drug tests. Despite this knowledge, he continued to use marijuana daily. The company gave Applicant the option to receive a six-month suspension, during which time he was required to complete a drug and alcohol program at his own expense, and then he could return to work under a two-year probationary period where he would be subjected to random drug testing. The other option was termination. Applicant opted for termination. (Tr. 29-31.)

In his answer to the SOR and during his testimony, Applicant acknowledged that he is aware that using marijuana remains illegal under federal law. He stated in his testimony:

I realize that in the Government's eyes, cannabis has been illegal since 1937 and I realize this is probably an uphill battle for me, but as I said, I've been in Government work most of my career and the outcome of this proceeding may have an impact on continued employment. (Tr. 20.)

Despite this knowledge, Applicant testified that his most recent marijuana use was the night prior to the hearing. Applicant intends to continue to use marijuana for pain management and sleep enhancement because he has not found a viable alternative. Regarding his continued use of marijuana despite its illegal status under federal law, he stated, "Again, I don't understand the Government's argument where it's just a simple use of a simple drug to relieve the pain could be grounds for denying a security clearance." (Tr. 31-34.)

Applicant submitted two character-reference letters. His current senior project manager, who has worked on numerous projects with Applicant, views him as someone with an excellent work ethic who is reliable, trustworthy, and dedicated. The Applicant's human resources manager states that Applicant is an integral part of the project management team with no history of performance issues. (AX B.) Applicant was straightforward and sincere while testifying.

### **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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's meeting the criteria contained in the AG. 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." See 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

## 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 ... 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.

The following conditions are applicable under this guideline:

AG ¶ 25(a): any substance misuse;

AG ¶ 25(b) testing positive for an illegal drug;

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution . . . .; and

AG ¶ 25(g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The following mitigating conditions are potentially applicable under this guideline:

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

AG ¶ 26(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;
- (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(c): abuse of prescription drugs was after a severe or prolonged illness during which drugs were prescribed, and abuse has since ended; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant was terminated from his job in 2019 after testing positive for marijuana on a company-administered drug test. He knew marijuana use violated company policy, but opted to use it anyway. He is aware that marijuana use remains illegal under federal law, but for health reasons, continues to use it on a daily basis and intends to do so in the future. His ongoing illegal use of marijuana raises doubt about his current reliability, trustworthiness, and judgment. None of the mitigating conditions apply.

### **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(a).

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 not mitigated the security concerns raised by his ongoing illegal drug use. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

### **Formal Findings**

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant

## **Conclusion**

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Stephanie C. Hess  
Administrative Judge