



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



In the matter of:)
)
) ISCR Case No. 23-02168
)
Applicant for Security Clearance)

Appearances

For Government: George Hawkins, Esq., and
Karen Moreno-Sayles, Esq., Department Counsel
For Applicant: Michael DeAngelis, Esq.

01/15/2025

Decision

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On December 15, 2022, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On March 11, 2024, the Defense Counterintelligence and Security Agency (DCSA) issued a statement of reasons (SOR) to Applicant. The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guideline H. (HE 2) On May 14, 2024, Applicant provided a response to the SOR and requested a hearing. (HE 3) On June 25, 2024, Department Counsel was ready to proceed.

On August 1, 2024, the case was assigned to me. On August 28, 2024, the Defense Office of Hearings and Appeals (DOHA) scheduled the case for hearing on October 9, 2024. (HE 1) On October 9, 2024, the hearing was rescheduled for November 4, 2024. (HE 1) The personal appearance was held as rescheduled, using the Microsoft Teams video teleconference system. The Government provided five exhibits and Applicant provided 13 exhibits. (Tr. 13; GE 1-GE 5; Applicant Exhibits (AE) A-AE M) Applicant's exhibits were provided as part of the SOR response. (Transcript (Tr.) 9) All exhibits were admitted into evidence. (Tr. 14) On November 13, 2024, DOHA received the transcript of the hearing. There were no post-hearing exhibits.

Department Counsel moved to amend the SOR. (Tr. 14; HE 4) Applicant did not object, and I granted the motion. (Tr. 14-15)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted in part, and he denied in part, the SOR allegations in ¶¶ 1.a, 1.b, and 1.c. For example, he admitted he tested positive in a urinalysis test for tetrahydrocannabinol (THC); however, he denied that he knowingly used marijuana. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 26-year-old employee of a DOD contractor who has worked in operations and program management for about one year. (Tr. 16, 18-19) He has been promoted in his current employment. (Tr. 19) He has been married four years, and he does not have any children. (Tr. 17)

Appellant received a Marine Corps scholarship his second year in ROTC, and he "was awarded two awards: Honor Graduate, awarded by the Marine Corps Association Foundation after [his] junior year and first year at the new university, and the American Legion's Gold Military Excellence award presented at [his] commissioning ceremony." (GE 4; AE F) He received a commission in the Marine Corps through officer candidate school. (Tr. 28; AE M)

Appellant served in the Marine Corps almost two years. (Tr. 17) In May 2020, he received a bachelor's degree, and he majored in political science. (Tr. 18, 30; AE F) He received two specialized certificates pertaining to his current employment. (Tr. 18; AE G) He received four certificates of commendation from the Marine Corps. (AE G) In March 2022, he received a general discharge under honorable conditions from the Marine Corps as a second lieutenant. (Tr. 17-18; GE 3 at 4) He has held a security clearance since

2019. (Tr. 21) His resume provides additional information about his professional background. (AE E)

Drug Involvement and Substance Misuse

Amended SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about January 2021 to at least August 2022. Applicant said he knowingly used marijuana in July of 2022 and August 2022. (Tr. 24) He denied using illegal drugs before January 2021. (Tr. 46) He denied knowingly using marijuana after August 2022. (Tr. 24) In the state where he used marijuana in 2022, state law does not prohibit possession of small amounts of marijuana or marijuana use. (Tr. 25) He was unemployed at the times he used marijuana in 2022. (Tr. 25)

Amended SOR ¶ 1.b alleges Applicant tested positive for THC in a drug test administered in January 2021, eventually resulting in his administrative separation from the United States Marine Corps. Applicant provided a urine sample on January 11, 2021, and he learned it tested positive for THC in February 2021. (Tr. 33)

In March 2021, Applicant's command counseled him about the discharge proceedings for the positive urinalysis test result for THC. (Tr. 34) He did not submit a rebuttal or comments in response to the counseling. (Tr. 34) Applicant said in March 2021, he told his drug counselor about his innocent ingestion of THC. (Tr. 45) On July 21, 2021, Applicant provided a letter detailing reasons why the Marine Corps should permit him to remain in the Marine Corps. (Tr. 36; GE 3 at 10-12) He never told the Marine Corps about the innocent ingestion of THC because:

other leaders that were around me for advice, in terms of what had happened here. I was told on multiple times that, you know, I wouldn't be believed with that story. And that they could consider an [nonjudicial punishment (NJP)] for just talking about that. So, you know, I knew I didn't do it. So I kind of just wanted to put out the facts of, you know who I am and the things that I have accomplished in my time with the Marine Corps. And I kind of just hoped like that would help my case. And unfortunately it did not. (Tr. 45-46, 55)

Applicant did not receive NJP or a separation board for using marijuana in 2021. (Tr. 56) He was worried that if he said he innocently ingested marijuana he would not receive an honorable discharge from the Marine Corps. (Tr. 56)

During the security clearance process, Applicant first disclosed to the government that he did not knowingly consume marijuana. (Tr. 23) He said, "[I]n January of 2021 we were coming back from post leave block for the holidays. And my wife and I attended a party at a friend's house, where notably I ingested a cookie and a brownie that had THC, and notably tested positive for a test the next week." (Tr. 21) He consumed about two or three drinks before arriving at the party, and he had about two drinks at the party. (Tr. 43) The cookie and brownie were in a package or packages, and they appeared to be "store bought." (Tr. 41) The packaging was clear. (Tr. 42) The friend hosting the party was from

Applicant's college. (Tr. 40) He had known the friend for about two years. (Tr. 42) He had been drinking, and he did not notice the effects of the THC. (Tr. 40) Applicant's spouse provided a statement indicating Applicant ate one cookie and one brownie at the gathering on January 5, 2021. (AE D) She said she and Applicant did not know the food at the party contained marijuana. (Tr. 22; AE D)

Applicant said he did not know there was marijuana in the food at the party. (Tr. 24) He did not confront the friend about serving marijuana at the party; however, his friend said something about the marijuana in the food after Applicant tested positive for marijuana. (Tr. 42, 44) He did not file a police report about the consumption of marijuana. (Tr. 44) He did not provide a statement from the friend whom he believed laced the food with marijuana. He did not provide details about his efforts to obtain corroboration that he did not knowingly use marijuana from anyone, except he obtained a statement from his spouse.

Amended SOR ¶ 1.c alleges Applicant used marijuana in January 2021, while holding a sensitive position, i.e., one in which he held a security clearance. Applicant said he was unaware that he was in a sensitive position. (Tr. 24)

Applicant has a debt for about \$137,000 for his college education because he did not complete his Marine Corps service. (Tr. 31; GE 3 at 4) He has not received a bill for his education from the Marine Corps. (Tr. 57) In 2021, he was aware that as a Marine Corps officer he was not supposed to possess and use marijuana because it violated federal law. (Tr. 32-33)

In March 2021, Applicant completed the Prime for Life drug counseling program. (Tr. 38, 54; AE C) In April 2024, he completed "the Truth about Marijuana online course." (AE C) In May 2025, he received a drug test, which was negative for all illegal substances. (Tr. 26) He described himself as a diligent employee who can contribute to national security. (Tr. 29)

Applicant said he did not use marijuana between January 2021 and July 2022. (Tr. 47) In July and August 2022, he intentionally smoked marijuana while he was unemployed. (Tr. 47, 50) He denied that he used marijuana after August 2022. (Tr. 47) He did not associate after August 2022 with the people who provided marijuana to him earlier in 2022. (Tr. 48, 50) On May 6, 2024, he provided a urine sample for drug testing, and it was negative for illegal substances. (AE A) He provided 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. (Tr. 25-26; AE B; See AG ¶ 26(b)(3))

On April 13, 2022, Appellant wrote the Defense Consolidated Adjudications Facility about his security clearance, and he said, "I have never used drugs prior to entering the Marine Corps and have not continued to use them since the incident" of January 2021. (GE 4, ¶¶ 5 and 6)

Applicant said his statements about innocent ingestion of marijuana should be believed because:

Sir, I'm someone who's always told the truth. Those things have been instilled in me since long before the Marine Corps, because I come from parents who were in the military. I come from a family of military veterans.

So kind of getting to this point, and getting to the officer ship and the different character values that I learned there, that's just who I am as a person. Like, I'm someone who always tells the truth. And I'm always going to be up front and available with whatever is going on, that if the Government or the military leadership had questions to me, I always made sure to be up front and honest about those things. Because they're always easier to get away from if you are up front and honest about them. (Tr. 53-54)

Character Statements

Applicant's supervisor described him as a valuable asset to their organization. (Tr. 26-27; AE H) Applicant's family is very supportive. (Tr. 28-29) His program manager, a coworker, a warrant officer, and a team lead said he was reliable, responsible, diligent, loyal, conscientious, helpful, dedicated, mature, and passionate. (AE H; AE J; AE K; AE L) His program manager recommended him for a promotion and increased responsibilities. (AE H) A Marine Corps captain, who served with Applicant, praised Applicant's duty performance, capabilities, and professionalism. (AE I)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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 meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “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, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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 provides conditions that could raise a security concern 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; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The Appeal Board recently discussed burdens of proof in a case involving a claim of innocent ingestion of THC. ISCR Case No. 22-01176 at 2-3 (App. Bd. Mar. 14, 2024). The Appeal Board said:

[W]e held that the applicant bears the burden of establishing innocent consumption in positive drug test cases. An applicant’s positive test for an illegal drug is sufficient to establish various Guideline H disqualifying conditions.¹ Once a positive drug test is proven, an applicant has the burden to rebut, explain, extenuate, or mitigate the security concerns arising from that positive test. Directive ¶ E3.1.15. When an applicant claims the positive drug test was the result of innocent use or consumption, the key issue will likely be whether he or she presented sufficient evidence to prove that claim and thereby refute the pertinent SOR allegations. Such a determination may hinge on an assessment of the applicant’s credibility.

Applicant did not raise the issue of innocent ingestion of THC until after he left the Marine Corps. I do not believe his claim that he innocently ingested marijuana. He did not provide an affidavit from the friend who provided the marijuana or from other party attendees, except for his spouse, about the marijuana-laced food served at the party. He did not meet his burden of establishing the innocent ingestion of marijuana. The record establishes AG ¶¶ 25(a) and 25(c). AG ¶ 25(f) is not established because it is unclear whether Applicant’s position when he used THC was a “sensitive position” as contemplated in the Directive. He did not explicitly indicate he used marijuana while having access to classified information. Additional discussion of the disqualifying conditions is in the mitigation section, *infra*.

AG ¶ 26 lists four conditions that could mitigate security concerns:

¹ For example, AG ¶¶ 25(a), “any substance misuse;” 25(b), “testing positive for an illegal drug,” and possibly others depending on the circumstances.

(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;

(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;

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

(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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

Possession of Schedules I, II, and III controlled substances is a federal criminal offense (Schedule III substances may be possessed with a lawful prescription). Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance. In addition, knowing possession and use of marijuana while in the Marine Corps violates Article 112a, Uniform Code of Military Justice.

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged 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 Standard Form 86 (SF-86), Questionnaire for National Security Positions.

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 (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

Applicant knowingly possessed and used marijuana or THC three times in January 2021, July 2022, and August 2022. He said he refrained from marijuana use after August 2022. He expressed his intention not to use illegal drugs in the future.

None of the mitigating conditions fully apply. Applicant’s false claim of innocent ingestion is damaging to his credibility and shows lack of rehabilitation. Applicant might decide to use marijuana in the future. I am not convinced Applicant’s cannabis use “happened under such circumstances that it is unlikely to recur [and] does not cast doubt on his current reliability, trustworthiness, [and] good judgment.” A concern remains that he will use marijuana in the future. More time without illegal drug use is necessary to fully mitigate Guideline H security concerns.

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 the 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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 26-year-old employee of a DOD contractor who has worked in the operations and program management for about one year. He has been promoted in his current employment. He received a commission in the Marine Corps. He joined the American Legion in 2020. He served in the Marine Corps about two years. He received a general discharge under honorable conditions from the Marine Corps as a second lieutenant. In May 2020, he received a bachelor’s degree, and he majored in political science. He received two specialized certificates and four certificates of commendation from the Marine Corps. He held a security clearance while in the Marine Corps. Multiple character witnesses positively described his character and duty performance. The only security issue relates to his marijuana possession and use. The character evidence supports reinstatement of his security clearance.

The evidence against reinstatement of Applicant’s security clearance is more persuasive. Applicant knowingly used THC or marijuana three times in January 2021, July 2022, and August 2022. His decisions to repeatedly possess and use cannabis, which is illegal under federal law, are an indication he lacks the qualities expected of those with access to national secrets.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. “[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant’s eligibility for access to classified information.” ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board’s jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate drug involvement and substance misuse security concerns.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of an individual’s eligibility and suitability for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under his current

circumstances, a clearance is not warranted. In the future, he may well demonstrate persuasive evidence of his security worthiness.

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:

Paragraph 1, Guideline H: AGAINST APPLICANT

Amended Subparagraphs 1.a through 1.c: Against Applicant

Conclusion

Considering all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge