



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



In the matter of:

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)
) ISCR Case No. 24-00908
)
)

Applicant for Security Clearance

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel

For Applicant: *Pro se*

04/29/2025

Decision

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guidelines H (drug involvement and substance misuse) and J (criminal conduct) are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On October 5, 2023, Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On October 2, 2024, the Defense Counterintelligence and Security Agency (DCSA) issued a statement of reasons (SOR) to Applicant 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 (SecEA) 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 Guidelines H and J. (HE 2) On October 22, 2024, Applicant provided a response to the SOR and requested a hearing. (HE 3) On December 19, 2024, Department Counsel was ready to proceed.

On January 15, 2025, the case was assigned to me. On January 21, 2025, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for February 25, 2025. (HE 1) The hearing was held as scheduled.

Department Counsel offered two exhibits into evidence; Applicant offered three exhibits into evidence (includes email conveying two exhibits); there were no objections; and I admitted all proffered exhibits into evidence. (Transcript (Tr.) 15-17; GE 1-GE 2; Applicant Exhibit (AE) A-AE C) On March 7, 2025, DOHA received a transcript of the hearing. Applicant provided one exhibit after his hearing, which was admitted without objection (AE D (nine pages)). The record closed on March 31, 2025. (Tr. 10, 45)

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 the SOR allegations in ¶¶ 1.a, 1.b, 1.c, and 2.a. (HE 3) His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 46-year-old senior program manager who has worked for a government contractor for about 18 months. (Tr. 6, 8) In 1996, he graduated from high school, and in 2001, he received a bachelor's degree. (Tr. 6) In 2004, he married, and his two daughters are ages 13 and 16. (Tr. 7) He has not served in the military. (Tr. 8) If his security clearance is denied, he will be able to retain his employment; however, he will be unable to assist his employer on classified contracts. (Tr. 26-27) Applicant has never held a security clearance. (Tr. 39) On July 31, 2023, he started the process of applying for a security clearance. (Tr. 39) He did not believe he held a sensitive position while working for his current employer. (Tr. 40)

Drug Involvement and Substance Misuse and Criminal Conduct

SOR ¶¶ 1.a and 1.b allege Applicant possessed and used marijuana with varying frequency from about January 1993 to about April 2023. SOR ¶ 1.c alleges Applicant pleaded guilty to misdemeanor possession of marijuana on or about August 1998. SOR ¶ 2.a cross alleges the drug involvement and substance misuse security concerns in SOR ¶¶ 1.a, 1.b, and 1.c under the criminal conduct guideline.

In 1998, Applicant was a college student. (Tr. 34) He was attending a party, and the police were called because of too much noise. (Tr. 35) The police found a pipe containing marijuana residue; Applicant admitted it was his pipe, and he was cited for and pleaded guilty to possession of marijuana. (Tr. 35; SOR response)

Applicant used marijuana about once a month from 1993 to 2011, and from October 2022 to April 27, 2023. (Tr. 28-32; GE 1) He smoked marijuana and consumed edibles containing tetrahydrocannabinol (THC). (Tr. 28-29; GE 1) From about 2011 to about October 2022, he did not use marijuana because his employers prohibited marijuana use, and those employers conducted tests to ensure employees were not using illegal drugs. (Tr. 29-30) He mostly obtained the marijuana in the 2022 to 2023 period from his neighbor (N1). (Tr. 35) On April 27, 2023, he consumed a marijuana edible. (Tr. 33) He discarded the remaining THC edibles. (Tr. 33) He chose to stop using marijuana on April 27, 2023, because it made him feel anxious and paranoid about the effect of marijuana on his life. (Tr. 33-34)

Applicant purchased the marijuana edibles at a shop near his residence. (Tr. 43) He believed that he consumed a low-dose THC product. (Tr. 44) The label on the gummie package reads, delta nine "THC: 0.945 mg/serving dose"; and "CBD: 9.347 mg/serving dose." (AE D at 6) The instructions said, "Start low, go slow. Consume one gummie until desired effect is achieved. Results may vary and may be delayed. Typically lasts 2-8 hours." *Id.* The number of grams each gummie weighs is not on the package.

Applicant ended his association with neighbor (N1), who provided marijuana to him. (Tr. 35) Applicant's possessions of marijuana were illegal under state law. (Tr. 36) Another neighbor (N2), who previously used marijuana with Applicant, has not used marijuana in Applicant's presence for two years. (Tr. 37) Applicant told N2 that if he uses marijuana, Applicant cannot be around him. (Tr. 36-37) Applicant's spouse is not a marijuana user. (Tr. 38) He did not use marijuana for medical reasons. (Tr. 38)

Applicant provided an affidavit of his intention to abstain from all drug involvement and substance misuse. (SOR response) He said:

I affirm my intent to abstain from all illegal drug involvement, including but not limited to the use, possession, distribution, manufacture, or facilitation of controlled substances as defined under federal law. Furthermore, I will not misuse any prescription or over-the-counter substances.

I acknowledge that any future involvement in illegal drug activities or substance misuse, as defined by applicable federal regulations, shall constitute grounds for the revocation of my national security eligibility, including any associated security clearances or employment positions requiring such eligibility. (AE B)

Applicant has not received a substance-abuse evaluation or attended substance-abuse counseling. (Tr. 38) He does not have any marijuana in his residence. (Tr. 43)

Applicant offered to submit to random drug testing for illegal drugs, and he concluded his hearing statement with the following comments:

I'm ashamed and embarrassed to be [making this statement at his hearing] today. I want to reiterate my full understanding of the responsibilities that

come with holding a security clearance and my own [un]wavering commitment to uphold the highest standards of trust and integrity and reliability. My past usage [of marijuana] was a personal decision made during a different time in my life. It does not define my character [or] my ability to serve in a position of trust. I've been completely transparent about my history and my actions and since then demonstrated a commitment to a lifestyle that aligns with federal regulations and professional expectations.

I recognize that national security requires individuals who are not only competent, but also trustworthy and responsible. My professional record reflects a pattern of sound judgment, ethical conduct, and dedication to upholding the values required for this role. I've taken proactive steps to ensure that my past decisions have no bearing on my ability to serve effectively and honorably. . . . I've been voluntarily truthful in reporting the information [about my history of marijuana use and] was truthful and complete in responding to any and all questions. I've changed my behavior to remove myself from situations where marijuana usage has occurred, provided the affidavit of my abstinence, and gotten the support of testimony from my [supervisor]. (Tr. 40-42)

Character Evidence

Applicant's supervisor since July of 2023 described him as reliable, responsible, and trustworthy. (Tr. 24-25) Applicant received a drug test when he started working for the DOD contractor. (Tr. 22) The drug test was negative for illegal substances. (Tr. 22) His employer's policy prohibits use of illegal drugs; however, his employer does not periodically test employees for use of illegal drugs. (Tr. 23) Of the approximately 100 employees in the company his supervisor works with, Applicant is in the top two. (Tr. 24) Applicant received an excellent performance evaluation. (AE C)

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 and Criminal Conduct

AG ¶ 24 describes the security concern about drug involvement and substance misuse:

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 ¶ 30 describes the security concern about 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."

AG ¶ 25 provides two drug involvement and substance misuse conditions that could raise a security concern and may be disqualifying in this case: "(a) any substance misuse (see above definition)"; and "(c) illegal possession of a controlled substance . . ."

AG ¶ 31 provides two criminal conduct conditions that could raise a security concern and may be disqualifying in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(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.

AG ¶¶ 25(a), 25(c), 31(a), and 31(b) are established. Discussion of the disqualifying conditions is in the mitigating section *infra*.

AG ¶ 26 lists four conditions that could mitigate drug involvement and substance misuse security concerns:

(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.

AG ¶ 32 lists four conditions that could mitigate criminal conduct security concerns:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; 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.

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).

Applicant admitted that he possessed and used marijuana. Marijuana is listed on Schedule I of the Controlled Substances Act. See 21 U.S.C. § 812(c); Drug Enforcement Administration listing at <https://www.dea.gov/drug-information/drug-scheduling>. Possession of marijuana is a federal and state criminal offense in the state where Applicant resides.

The 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 used marijuana from about 1993 to about 2011 about once a month. He smoked marijuana and consumed THC edibles. He resumed monthly marijuana use from about October 2022 to April 27, 2023. He did not hold a security clearance, did not occupy a sensitive position, and had not applied for a security clearance. There is no evidence he held a “sensitive position” as defined by the DOHA Appeal Board, which has stated:

For purposes of national security eligibility determinations, the Directive defines “sensitive position” as:

Any position within or in support of an agency in which the occupant could bring about, by virtue of the nature of the position, a material adverse effect on the national security regardless of whether the occupant has access to classified

information, and regardless of whether the occupant is an employee, military service member, or contractor.

SEAD 4, ¶ D.8. We have previously held that this broad language is “designed to be inclusive and encompass a wide range of positions, including those that require eligibility for access to classified information (i.e., a security clearance).” ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023). The term “sensitive position” is not so broad, however, to encompass any and all employment with a defense contractor.

ISCR Case No. 22-02623 at 4 (App. Bd. Jan. 24, 2024).

The Appeal Board discussed disqualifying condition AG ¶ 25(f) (any illegal drug use while granted access to classified information or holding a sensitive position), and noted that AG ¶ 25(f):

provides a basis for disqualification that is distinct from the simple drug use the Judge addressed under AG ¶¶ 25(a) and 25(c). Conduct falling under AG ¶ 25(f) reflects a heightened security concern inasmuch as individuals who have already been granted access to classified information or who hold sensitive positions are held to a higher standard than individuals not similarly situated because of the existing potential to adversely impact national security. See Security Executive Agent Directive 3, Reporting Requirements for Personnel with Access to Classified Information or Who Hold a Sensitive Position (effective June 12, 2017); ISCR Case No. 22-01661 at 3 (App. Bd. Sep. 21, 2023). It is undisputed that Applicant’s drug use occurred after he was granted access to classified information and/or was in a sensitive position. Although he maintained that he was not working on a classified program at the time of his drug use, that is of no consequence because he was employed in a sensitive position. See ISCR Case No. 22-02623 at 3 (App. Bd. Jan. 24, 2024).

ISCR Case No. 23-01884 at 3 (App. Bd. Nov. 6, 2024). AG ¶ 25(f) was not alleged in the SOR and was not established in this case.

Applicant presented some important mitigating information. He ended his misuse of marijuana on April 27, 2023; he disclosed his drug involvement in his SCA; and he admitted his drug involvement in his SOR response and at his hearing. His misuse of drugs in the October 2022 to April 2023 timeframe was not discovered through a polygraph test, investigative efforts, or a urinalysis test. He avoids persons and environments where illegal drugs are used or likely to be used. He promised not to use illegal drugs in the future, and he provided a statement of intent not to use illegal drugs. He did not have a drug use disorder diagnosis, and there is no recommendation that he receive drug counseling or treatment.

Applicant's supervisor praised his diligence, trustworthiness, and reliability, and rated him as one of the top employees working for the DOD contractor. He received an excellent performance evaluation.

Applicant's decisions to possess and use illegal drugs are an indication he lacks the qualities expected of those with access to national secrets. However, the time between Applicant's most recent involvement with marijuana and his hearing was about 22 months, and this period along with his good character evidence, and promise not to use marijuana in the future are sufficient under all the circumstances to fully establish AG ¶¶ 26(a), 26(b), 32(a), and 32(d). His involvement with illegal drugs is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and judgment. Guidelines H and J security concerns are mitigated.

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 Guidelines H and J are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 46-year-old senior program manager who has worked for a government contractor for about 18 months. In 2001, he received a bachelor's degree. Applicant has never held a security clearance. On July 31, 2023, he started the process of applying for a security clearance. His supervisor lauded his hard work, trustworthiness, and reliability. He received an excellent performance evaluation.

Applicant was a credible witness during his security clearance hearing. He used marijuana until April 27, 2023. He ended his drug involvement and substance misuse before he completed his SCA, and he did not use illegal drugs while having access to classified information or holding a sensitive position. As of his February 25, 2025 hearing, he had abstained from all illegal drug involvement for about 22 months. He promised not to use illegal drugs in the future.

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 mitigated drug involvement and substance misuse and criminal conduct security concerns.

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:	FOR APPLICANT
Subparagraphs 1.a, 1.b, and 1.c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.b:	For Applicant

Conclusion

Considering all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

Mark Harvey
Administrative Judge