



Applicant for Security Clearance

For Government: Brittany White, Esq., Department Counsel
For Applicant: Matthew Thomas, Esq.

04/21/2025

Decision

HARVEY, Mark, Administrative Judge:

Statement of the Case

On March 6, 2018, and February 5, 2024, Applicant completed and signed Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance applications (SCA). (Government Exhibits (GE) 1 and 2) On September 13, 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 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)

November 18, 2024, Applicant provided a response to the SOR and requested a hearing. (HE 3) On January 23, 2025, Department Counsel was ready to proceed.

On January 28, 2025, the case was assigned to me. On January 28, 2025, I was advised that Applicant's sponsorship for a security clearance was scheduled to be terminated on February 7, 2025, due to loss of employment, and the hearing needed to be scheduled before that date to ensure jurisdiction. (Tr. 43) The parties concurred with a hearing date of February 6, 2025. (HE 1A) On January 29, 2025, the Defense Office of Hearings and Appeals (DOHA) issued a notice, scheduling the hearing for February 6, 2025. (HE 1B) The hearing was held as scheduled.

Department Counsel offered four exhibits into evidence; Applicant offered eight exhibits into evidence; there were no objections; and I admitted all exhibits into evidence. (Transcript (Tr.) 13-16; GE 1-GE 4; AE A-H) On February 16, 2025, DOHA received a transcript of the hearing. Applicant provided one exhibit after his hearing, which was admitted into evidence without objection. (Applicant Exhibit (AE) I) The record closed on March 19, 2025. (AE I)

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 and 1.b. (HE 3) His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 28-year-old information technology (IT) site lead. (Tr. 17, 23-24; GE 2) He grew up in a military family with strong moral values. (Tr. 18) In high school he participated in theater, football, concert choir, and show choir. (Tr. 19) He was a member of the National Honor Society. (Tr. 19) He volunteered in his community. (Tr. 19) In 2016, he graduated from high school, and he attended college for about two years. (Tr. 20) In 2017, he worked at the front desk of a community center. (Tr. 21) From 2018 to October 2020, Applicant and a friend worked in their own computer-repair business. (Tr. 21) He also worked in support of a federal agency. (Tr. 22) He lost his employment from August of 2020 to February of 2021 due to the COVID-19 pandemic. (Tr. 22) He was promoted at the federal agency to senior field technician in July of 2021 and to site lead in the summer of 2023. (Tr. 23)

From 2020 to 2023, Applicant received back therapy from a chiropractor to address his back pain. (Tr. 25) In 2023, a chiropractor diagnosed Applicant with a lumbar curve in his back. (Tr. 24) The chiropractor's therapy helped in the short term, but was ineffective in the long term, and Applicant asked a doctor for help with his pain. (Tr. 25) In March of 2022, the doctor prescribed medical marijuana for him, and he received a medical marijuana card. (Tr. 25; AE A) The medical marijuana card authorized him to purchase marijuana under a state law. (AE A)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about March of 2021 to about April of 2024. SOR ¶ 1.b alleges Applicant used marijuana while being granted public trust eligibility or while in a sensitive position, i.e., one requiring a security clearance.

In 2018, Applicant submitted an SCA for a public trust position. (Tr. 26; GE 1) He did not disclose any involvement with illegal drugs in his SCA. (Tr. 26; GE 1) In his February 5, 2024 SCA, he said he used marijuana from March of 2021 to February 2024. (GE 2 at 30) He also said, "I intend to continue using THC at home medically for my frequent back pain . . . provided to me by the state." (GE 2 at 31) He indicated his intention to continue to use marijuana based on the advice of his physician. (Tr. 29)

Applicant denied that he used marijuana before 2022. (Tr. 26) Once he had a marijuana card, he purchased marijuana at state-authorized dispensaries. (Tr. 27) He did not use marijuana during working hours or for recreation. (Tr. 28) He does not associate with known marijuana users or go to locations where he knows marijuana is being used. (Tr. 28)

An Office of Personnel Management (OPM) investigator asked Applicant if he was willing to end his marijuana use to have a security clearance, and Applicant said, yes. (Tr. 30) In his response to DOHA interrogatories, Applicant said his doctor told him that marijuana use was legal under federal law, and his doctor recommended he use medical marijuana to alleviate his back pain. (Tr. 31-32; GE 4) He also stated he did not intend to use marijuana in the future to further his career and to support the Federal Government. (Tr. 32-33; GE 3)

In his May 20, 2024 response to DOHA interrogatories, Applicant said his most recent marijuana use was on April 3, 2024. (GE 3 at 4) He used marijuana from March 2022 to April 2024 about two to three times a week depending on the pain. (GE 3 at 4, 8)

From 2018 to 2024, Applicant held a public trust position, and he did not have a security clearance. (Tr. 33, 39) He denied that he had access to sensitive information. (Tr. 33, 42-43) He said if there is a data spill the matter is transferred to someone with a security clearance. (Tr. 43) He said at his hearing that he did not use marijuana after March 2024. (Tr. 36) He decided not to use marijuana on April 3, 2024. (Tr. 30) He did not suffer withdrawal symptoms or crave marijuana. (Tr. 36-37)

Applicant sees a chiropractor on a weekly or bi-weekly basis. (Tr. 37) His chiropractor treatments successfully assuaged his back pain. (Tr. 37-38) If the chiropractor treatments become ineffective, he promised not to return to his marijuana use. (Tr. 38)

On November 18, 2024, Applicant signed a statement of intent to abstain from all drug involvement and substance misuse and to avoid associations with known drug users and environments where illegal drugs are used. (AE B) He acknowledged that any future involvement or misuse of drugs is grounds for automatic revocation of national security eligibility. (Tr. 34; AE B) See AG ¶ 26(b)(3).

On December 16, 2024, Applicant provide urine and hair samples for drug testing. (AE D) Both samples were negative for the presence of illegal substances. (Tr. 35; AE D)

On January 30, 2025, Applicant received a psychological evaluation. (AE F) The evaluating psychologist concluded there was no diagnosis of substance use disorder. (AE F at 4) She said his prognosis is good and his risk is low for relapse. (AE F at 5)

Some of Applicant's friends use marijuana. (Tr. 41) He does not associate with them when they are using marijuana. (Tr. 41-42) Applicant emphasized that he loves the United States. (Tr. 43) He loves the work he does for the Federal Government, and he wants to continue his employment. (Tr. 43)

Character Evidence

Applicant received two challenge coins. (AE G) He provided statements from coworkers, friends, his Chief Executive Officer, girlfriend, brother, and mother. (AE H) The general sense of their statements is that he is helpful, diligent, knowledgeable, trustworthy, and professional. He makes valuable contributions to his employer and is helpful to his family, friends, and his community.

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 record establishes AG ¶¶ 25(a) and 25(c). AG ¶ 25(f) is not established because Applicant did not use “illegal drugs while granted access to classified information or holding a sensitive position.” Additional discussion of the disqualifying conditions is in the mitigation section, *infra*.

AG ¶ 26 lists four conditions that could mitigate 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.

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>.

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 few 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)).

SOR ¶ 1.b alleges Applicant used marijuana while being granted public trust eligibility or while in a sensitive position, i.e., one requiring a security clearance. Applicant admitted SOR ¶ 1.b, and clarified that he had a public trust position while he was using marijuana, but was not in a sensitive position. The DOHA Appeal Board has discussed the term of “holding a sensitive position” as follows:

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).

Applicant’s Counsel argued that there is a trend in the Federal Government to reduce the negative legal effects or collateral consequences of marijuana possession. (Tr. 48-51; AE I) Section 537 of the Consolidated Appropriations Act (2016) prohibits the Department of Justice (DOJ) from spending funds for the prosecution of individuals who engage in conduct permitted by state medical marijuana laws and who have fully complied with such laws. See *United States v. Bilodeau*, 24 F.4th 705, 712 (1st Cir. 2022) (holding prohibition on use of DOJ funds for prosecution under Section 537 did not bar use of DOJ funds to prosecute defendants in the case at bar because defendants did not completely comply with state laws authorizing medical marijuana); *United States v. McIntosh*, 533 F.3d 1163 (9th Circuit 2016) (remanding to district court for evidentiary hearing to assess whether conduct of defendants was authorized under state law).

On December 22, 2023, President Biden noted that convictions for possession of marijuana “have imposed needless barriers to employment, housing, and educational opportunities” and the “unnecessary collateral consequences” of convictions for marijuana possession and use. (AE I) He issued a presidential pardon to citizens such as Applicant who engaged in simple possession and use of marijuana. (AE I) However, the pardon does not apply to offenses after the date of the pardon, and the pardon does not mention security clearances or access to classified information.

The DOHA Appeal Board cited the importance of consideration of “the changing landscape of marijuana law and . . . of the Director of National Intelligence’s *Clarifying Guidance Concerning Marijuana*.” ISCR Case No. 23-02402 at 4 (App. Bd. Feb. 19, 2025). See also ISCR Case No. 24-00914 at 3 (App. Bd. Apr. 9, 2025) (noting the “evolving landscape of marijuana law and policy,” “the resulting increasing prevalence of marijuana use,” and in some instances “recreational marijuana use deserves less, or even no negative inference on judgment.”) Applicant was compliant with state law when he used medical marijuana from about March of 2021 to about March or April of 2024.

In this instance, there is insufficient evidence that Applicant was holding a sensitive position under AG ¶ 25(f) when he was using marijuana. However, his use of marijuana while holding a public trust position is a factor that must be considered in the analysis along with the numerous uses of marijuana (sometimes two or three times a week) from about March of 2021 to about March or April of 2024.

Applicant said he ended his marijuana use in March or April 2024, and his hearing was on February 6, 2025. He had less than one year of abstinence from marijuana use at the time of his hearing. He is credited with disclosure of his marijuana involvement on his SCA. His misuse of drugs 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. A psychologist concluded he did not have a drug use disorder and did not recommend drug treatment. He received a good prognosis.

On November 18, 2024, Applicant signed a statement of intent to abstain from all drug involvement and substance misuse and to avoid associations with known drug users and environments where illegal drugs are used. He acknowledged that any future involvement or misuse of drugs is grounds for automatic revocation of national security eligibility. He satisfied the requirements of AG ¶ 26(b)(3), except he has not established a sufficient “pattern of abstinence of marijuana use.” See generally ISCR Case No. 24-00914 at 6 (App. Bd. Apr. 9, 2025).

Applicant’s decisions to possess and use marijuana while holding a public trust position and after completion of SCAs are an indication he lacks the qualities expected of those with access to national secrets. The time between Applicant’s involvement with marijuana and his hearing was less than one year and is insufficient. His fairly recent involvement with marijuana continues to cast doubt on his current reliability, trustworthiness, and judgment. Guideline H security concerns are not mitigated at this time.

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 28-year-old IT site lead. He was raised with strong moral values. In high school he participated in many activities. He was a member of National Honor Society and volunteered in his community. He attended college for about two years. He was promoted at the federal agency where he was employed to senior field technician in July of 2021 and to site lead in the summer of 2023.

Applicant received two challenge coins. He provided statements from multiple people, and the general sense of their statements is that he is helpful, diligent, knowledgeable, trustworthy, and professional. He makes valuable contributions to his employer and is helpful to his family, and friends.

The disqualifying and mitigating information is discussed in the drug involvement and substance misuse analysis section, *supra*. The reasons for denial of Applicant's access to classified information are more persuasive at this time. He used marijuana on numerous occasions from about March of 2021 to about March or April of 2024. He held a public trust position while he was using marijuana.

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.

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.

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
Subparagraphs 1.a and 1.b:	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 Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge