



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 24-01713

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

05/21/2025

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse). Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 25, 2023. On October 11, 2024, the Defense Counterintelligence and Security Agency (DCSA) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DCSA acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), which became effective on June 8, 2017.

Applicant answered the SOR on November 15, 2024, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 23, 2024. The case was assigned to an administrative judge on March 3, 2025. On March 18, 2025, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on April 22, 2025. The case was reassigned to me on April 10, 2025. I convened the hearing as scheduled. Government Exhibits (GX) 1, 2, and 3 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. DOHA received the transcript on May 1, 2025.

Findings of Fact

In Applicant's answer to the SOR, he admitted the two allegations in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 25-year-old mechanical systems design and analysis engineer employed by a federal contractor since August 2022. He received a bachelor's degree in May 2022. He has lived with his girlfriend since September 2022.

The status of Applicant's security clearance is unclear. He received an interim security clearance and signed a nondisclosure agreement on October 20, 2022. (GX 3) In his SCA dated October 10, 2023, he stated that he submitted an SCA in August or September 2022 that was rejected because of his place of birth was incorrect. (GX 1 at 34) At the hearing, he was unsure whether his interim clearance had been withdrawn. (Tr. 28)

At the hearing, Applicant testified that he first used marijuana when he was 16 years old and in high school, but he did not start to use it regularly until he was in college and obtained a medical marijuana card. (Tr. 21) He testified that after he graduated from college in May 2022, he knew that he wanted to work as a federal contractor in engineering and aerospace, and he stopped using marijuana. He told his girlfriend that he wanted to work as a federal employee and he intended to stop using marijuana, and "she was fine with that and I was fine with that." (Tr. 16-17)

During a security interview in March 2024, Applicant told an investigator that he had a medical marijuana card from July 2019 to July 2021, and he purchased and used marijuana and THC vape products on Friday and Saturday nights to help him sleep. He stopped using marijuana in July 2021, when his marijuana card expired. In his response to DOHA interrogatories and in his testimony at the hearing, he admitted that he knew that use of marijuana was illegal under federal law. (GX 2; Tr. 17) In March 2024, after his marijuana card expired, he used his live-in girlfriend's THC vape product one time while they were watching television together. He told the security investigator that he used his girlfriend's THC vape "because it was available in the moment." (GX 2 at 5)

There is no evidence that Applicant's employer cautioned him about the prohibition on marijuana use when he submitted his SCA in October 2023, but he admitted that he knew that marijuana possession and use were illegal under federal law. He admitted that

he knew he should have reported his marijuana violation to his employer, but he did not do so, even after the security investigator questioned him about it. (Tr. 18, 29)

Applicant's girlfriend has a medical marijuana card and still uses it, but they have an agreement that she will not smoke it in the house when Applicant is present. (Tr. 19) His girlfriend has no plans to stop smoking marijuana. (Tr. 20) He testified that he has not used marijuana since the one-time use in March 2024. (Tr. 26) He submitted no evidence of drug counseling or treatment.

When Applicant submitted his SCA, he answered "No" to all the questions regarding illegal drug use. (GX 1 at 31-32) He admitted at the hearing that he should have disclosed his drug use, but he was unsure if he was required to disclose his drug use while in high school or while he had a medical marijuana card. He admitted that after he submitted his SCA, he knew he should have disclosed his marijuana use after his marijuana card expired. He also understood that he should have reported his March 2024 marijuana use to his employer and still had not done so at the time of the hearing. Because his failure to disclose his drug use in his SCA was not alleged in the SOR, I have considered it only for the limited purposes of assessing his credibility; to evaluate his evidence of extenuation, mitigation, or changed circumstances; to consider whether he has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; and as part of my whole person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

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 § 2.

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, 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.” 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* at 531. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” See ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019). It is “less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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. ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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* at 531.

Analysis

Guideline H (Drug Involvement and Substance Misuse)

SOR ¶ 1.a alleges that Applicant used marijuana with varying frequency from about January 2018 to about March 2024. SOR ¶ 1.b alleges that he purchased marijuana with varying frequency from about January 2018 to about July 2021. The concern under this guideline is set out in AG ¶ 24:

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.

On October 25, 2014, the Director of National Intelligence (the Security Executive Agent (SecEA)) issued DNI Memorandum ES 2014-00674, "*Adherence to Federal Laws Prohibiting Marijuana Use*," which states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

On December 21, 2021, the SecEA promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications. It states in pertinent part:

[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.

Applicant admitted that he knew that marijuana use was illegal under federal law, and he knew that he needed to stop using marijuana if he wanted to work for a federal contractor. His admissions establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

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

AG ¶ 25(f) (“any illegal drug use while granted access to classified information or holding a sensitive position”) also is established, even though it is unclear whether Applicant held an interim clearance when he used marijuana in March 2024. Even if his interim clearance had been withdrawn when he used marijuana, he was still employed in a position for which a security clearance was required, making it a sensitive position.

The following mitigating conditions are potentially applicable:

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; 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.

AG ¶ 26(a) is not established for Applicant’s use of marijuana, alleged in SOR ¶ 1.a. His last use was recent, only about a year ago, but it was after he was granted an interim clearance. It was arguably infrequent, because it was a one-time use after his marijuana card expired. He knew that his marijuana card had expired, and his use of marijuana violated both state and federal law. It did not happen under unusual circumstances making recurrence unlikely. Instead, it happened because he simply reacted to “the moment” and joined his girlfriend in smoking a THC vape.

AG ¶ 26(a) is established for Applicant's purchase of marijuana, alleged in SOR ¶ 1.b. His last purchase was almost four years ago in a jurisdiction where purchase was legal, and he did so with a medical marijuana card. He has not purchased marijuana since his medical marijuana card expired.

AG ¶ 26(b) is not established. Applicant continues to live with his marijuana-using girlfriend, he has not changed the environment in which he used marijuana, and he has not provided a signed statement of intent to abstain from all drug involvement and substance abuse.

Whole-Person Analysis

Under AG ¶ 2(c), the 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. An administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. An 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.

I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant was candid and sincere at the hearing, but his testimony demonstrated that he has not fully adopted the mindset required of persons entrusted with classified information. He is basically honest but immature and naïve. His certainty that he can continue to live with a regular THC user and not fall victim to a spontaneous "moment" of marijuana use again is naïve and does not inspire confidence that he will follow the rules required of persons entrusted with classified information.

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 drug involvement.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement and Substance Misuse):

AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Subparagraph 1.b:

For Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge