



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



In the matter of:)
)
) ISCR Case No. 24-01854
)
Applicant for Security Clearance)

Appearances

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

06/16/2025

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 January 4, 2024, Applicant completed and signed Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On December 26, 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)

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 January 19, 2025, Applicant provided a response to the SOR and requested a hearing. (HE 3) On February 28, 2025, Department Counsel was ready to proceed.

On March 3, 2025, the case was assigned to me. On March 4, 2025, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for April 23, 2025. (HE 1) The hearing was held as scheduled.

Department Counsel offered five exhibits into evidence; Applicant did not offer any exhibits into evidence; there were no objections; and I admitted all proffered exhibits into evidence. (Transcript (Tr.) 9, 14; GE 1-GE 5) On May 5, 2025, DOHA received a transcript of the hearing. Applicant provided five exhibits after his hearing, which were admitted into evidence without objection. (Applicant Exhibit (AE) A-AE E) The record closed on May 27, 2025. (Tr. 47)

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) He denied the SOR allegation in ¶ 1.c. He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 33-year-old data engineer, who has worked for a Department of Defense contractor for about 18 months. (Tr. 6, 8; GE 1) In 2010, he graduated from high school. (Tr. 7) He served in the Army from 2013 to 2017. (Tr. 23, 45; AE A) His military occupational specialty (MOS) was infantryman (11B). He received the following Army awards, medals, and badge: Army Achievement Medal; Army Good Conduct Medal; National Defense Service Medal; Global War on Terrorism Service Medal; Army Service Ribbon; Overseas Service Ribbon; and Expert Marksmanship Badge with Rifle Bar. (AE A) He may have received an Army Commendation Medal. (Tr. 47) He was a specialist, and he received an honorable discharge. (Tr. 46; AE A)

In 2017, Applicant received an associate degree in general studies. (Tr. 7) In 2021, he graduated *magna cum laude* with departmental honors and received a bachelor's degree in chemistry. (Tr. 7; AE C) In 2022, he received a master's degree in biomedical science. (Tr. 7) He received a prestigious award in his professional specialty and published five professional scientific articles. (AE C) He has never married. (Tr. 7) He plans to marry in October 2025. (Tr. 7) He does not have any children. (Tr. 8) He received an award for being employee of the month in September 2024. (AE D) His resume provides additional information about his professional accomplishments. (AE B)

Drug Involvement and Substance Misuse

SOR ¶¶ 1.a and 1.b allege Applicant purchased and used marijuana with varying frequency from about March of 2023 to about November of 2024, including while holding

a sensitive position, i.e., one in which he held a security clearance or interim security clearance. SOR ¶ 1.c alleges Applicant intends to continue to use marijuana.

Applicant first used marijuana in high school. (Tr. 17) He did not resume his marijuana use until he was in graduate school around March of 2023, when it was legalized in his state under state law. (Tr. 17-18) Since marijuana possession and use were not prohibited under state law, he believed it was alright for him to use marijuana. (Tr. 19) He did not investigate the applicability of federal laws concerning marijuana. (Tr. 19) He usually used marijuana on weekends, and rarely used marijuana during the week. (Tr. 20) He purchased marijuana about twice a month. (Tr. 20) He used marijuana at his residence. (Tr. 21) Once his fiancée obtained her nursing employment, she ended her marijuana use. (Tr. 21) He most recently used marijuana in December 2024 or early January 2025. He was unsure if he used marijuana shortly before or after he received the December 26, 2024 SOR. (Tr. 22, 42-43)

On December 1, 2023, Applicant received a security clearance and signed a nondisclosure agreement. (GE 4) However, Applicant said, “I also submit that any minimal, state-legal use **prior to receiving a clearance** does not indicate unreliability or a lack of trustworthiness and should be mitigated under Guideline H.” (AE C at 2 (emphasis added)) In the same statement, he said he used marijuana while holding a sensitive position. (AE C at 1, 2)

When Applicant completed his January 4, 2024 SCA, he did not disclose any use of illegal drugs in Section 23. (GE 1 at 28) He said he misread the questions about possession or use of illegal drugs. (Tr. 27) He interpreted the question to be asking about illegal use of drugs, and he believed at the time that his marijuana use was legal. (Tr. 27) On February 1, 2024, an Office of Personnel Management (OPM) investigator interviewed Applicant, and he disclosed his marijuana use from March 2023 to present on weekends. (Tr. 27-28; OPM report of investigation (ROI) at 8) He purchases marijuana about twice a month. *Id.* He said if marijuana use is authorized, he will use it; however, if his employer prohibits marijuana use, he will not use it. *Id.*

On July 10, 2024, Applicant completed a questionnaire which asked whether he used illegal drugs, and it explained that marijuana is a Schedule 1 controlled substance and is federally illegal. (Tr. 30; GE 3 at 4) Applicant checked no because he was focused on the word “illegally,” and he did not interpret his marijuana use to be illegal. (Tr. 31) He said he misinterpreted the question. (Tr. 31) He conceded it was illegal to possess and use marijuana because federal law prohibits marijuana possession. (Tr. 34) On November 13, 2024, Applicant responded to a DOHA interrogatory, which specifically asked about his marijuana use, and he explained he uses marijuana within the parameters of state law, which permits marijuana use. (Tr. 37-38; GE 2 at 17) After he responded to the DOHA interrogatory on November 13, 2024, he said he did not realize that using marijuana was a security issue. (Tr. 38-39) He conceded he made multiple errors about his marijuana use. (Tr. 40) He does not associate with marijuana users. (Tr. 45)

Applicant described his past marijuana use as limited and aligned with state law. (AE C) He did not believe it posed a risk to national security or his ability to safeguard classified information. *Id.* He acknowledged the seriousness of the concerns raised in the SOR and asked that the security concerns be mitigated. *Id.* He strives to uphold the highest standards of integrity and responsibility, and he is committed to adhering to all federal, departmental, and contractual requirements related to his security clearance. *Id.*

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), 25(c), and 25(f). 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.a and 1.b allege, and Applicant admitted, he purchased and used marijuana with varying frequency from about March of 2023 to about November of 2024, including while holding a sensitive position, i.e., one in which he held a security clearance or interim security clearance. SOR ¶ 1.c alleges, and Applicant denied, that he intends to continue to use marijuana. He credibly stated that he intends to abide by all rules related to security clearances, including refraining from marijuana use. SOR ¶ 1.c is mitigated.

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).

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 not in violation of state law when he used marijuana from about from about March of 2023 to about December of 2024.

In this instance, there is sufficient evidence that Applicant was holding a sensitive position under AG ¶ 25(f) when he was using marijuana from about March of 2023 to about December of 2024. His hearing was on April 23, 2025. He had less than six months of abstinence from marijuana possession and use at the time of his hearing. He is credited with disclosure of his marijuana involvement during the security clearance process. His use of marijuana 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.

AG ¶¶ 26(a) and 26(b) do not apply because Applicant has not fully established a sufficient pattern of abstinence of marijuana possession and use. His decisions to possess and use marijuana while holding a sensitive position 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 about six months and is insufficient. His relatively 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 33-year-old data engineer who has worked for a Department of Defense contractor for about 18 months. He served in the Army from 2013 to 2017. His MOS was infantryman (11B). He received several Army awards, medals, and a badge. He received an honorable discharge. In 2017, he received an associate degree in general studies. In 2021, he graduated *magna cum laude* with departmental honors and received a bachelor's degree in chemistry. In 2022, he received a master's degree in biomedical science. In September 2024, he was employee of the month. (AE D) He received a prestigious award in his professional specialty and is an author or coauthor on five professional scientific articles. (AE E)

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 several occasions from about from about March of 2023 to about December of 2024. He held a sensitive position while he was possessing and using marijuana.

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
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For 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