



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



In the matter of

Applicant for Security Clearance

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ISCR Case No. 23-01538

Appearances

For Government: Troy Nussbaum, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2026

Decision

KATAUSKAS Philip J., Administrative Judge:

This Decision was delayed when all administrative judges were furloughed from October 1 through November 12, 2025, during a federal government shutdown due to a lapse in federal funding. Applicant did not mitigate security concerns about his drug involvement and substance misuse. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application (SCA) on November 10, 2022. On December 11, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse) The DOD issued the SOR 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 Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on February 7, 2024, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on September 4, 2024. On June 4, 2025, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted in person on July 31, 2025. I convened the hearing as scheduled. Government Exhibits (GE) 1 and 2 were admitted without objection. The record was left open until August 21, 2025. Applicant offered no exhibits. DOHA received the transcript (Tr.) on August 12, 2025.

Findings of Fact

Applicant is 49 years old, has been married since 2004, and has a daughter eight years old. He earned his bachelor's degree in June 2022. Since October 2022, he has been employed as a senior software engineer by a federal contractor (GE 1; Tr. 22.)

The SOR alleged that Applicant: (a) used marijuana with varying frequency from about 1993 to about December 2022 and; (b) used marijuana with varying frequency while employed in a sensitive position from about October 2022 to about January 2023. He admitted those allegations and further answered as follows:

a. My use of marijuana has always been extremely infrequent, and for the last 5 or more years has only been to help with sleep on occasion when needed.

b. I do acknowledge my prior marijuana use, and have established a pattern of abstinence including:

1. The people I used to smoke recreationally with I no longer associate with;

2. I no longer go to the places where I used to go to use marijuana recreationally; and

3. I am providing a signed statement of intent to abstain from all drug involvement and substance misuse below:

I hereby state that I intend to abstain from all drug involvement and substance misuse including marijuana. I acknowledge that any future involvement or misuse is grounds for revocation of national security eligibility.

In Applicant's November 10, 2022 SCA, he reported his marijuana use as follows:

I smoke marijuana occasionally and consume THC edibles to help with insomnia. I smoke marijuana recreationally with friends and have

been doing so for around 25 years. I smoke approximately once a month for the last decade or so. He reported his first marijuana use occurred in January 1998 and his most recent marijuana use occurred in September 2022. (GE 1.)

The following are excerpts from the summary of Applicant's verified personal subject interview (PSI) conducted on January 3, 2023:

He last used marijuana on December 31, 2022 when he was celebrating New Year's . . .

He has never had any drug related treatment or counseling and has never been diagnosed as being dependent on drugs. He has never tested positive on a drug screen, with his most recent drug screen being when he started his current job. He was asked if he could stop if he wanted to and he indicated that he could. Subject was asked if he would stop using, and he indicated that he wouldn't stop because use it's legal in so many states, and he believes it will be legal everywhere soon. He indicated that depending on the circumstances he might stop and would think hard about it with his current job, as he likes the work and he likes the company. Subject's wife and friends are aware of his use of illegal drugs. (GE 2.)

In his August 6, 2023 responses to interrogatories, Applicant stated that he had no intention to use marijuana in the future. (GE 2.)

Applicant's Hearing Testimony

Applicant recounted his employment history before his current job. He was laid off, terminated by mutual agreement, or downsized. None of his prior job terminations were caused by his use of illegal drugs. He believed he began using marijuana in the late 1990s. He used it with friends in each other's homes. He believed the last time he used marijuana was in January 2023. (Tr. 22-32.)

Applicant testified that he has no intention of using drugs in the future and that he does not associate with persons who use illegal substances or frequent places where he has reason to believe illegal substances are being used. He no longer associates with individuals who use illegal drugs. He has cut ties to individuals to the extent necessary to no longer associate with friends who use marijuana. Neither his spouse nor any family members or remaining friends use marijuana. If he were in a social event and marijuana were presented to him, he would say "no thank you, I don't want to smoke or use any." (Tr. 32-34.)

Applicant testified about his bouts of insomnia, headaches, and anxiety. He previously took prescription medications but felt those were too strong. He now uses ultrasound and breathing techniques to help with those symptoms. The ultrasound is "a handheld thing" that he can use on parts of his neck that helps calm him down. He also takes over-the-counter supplements. He does sleep apnea treatments with a professional

doctor. Treating the sleeping condition helps resolve the headaches and anxiety. (Tr. 34-36, 45.)

Applicant confirmed his SCA that he had been smoking marijuana about 12 times a year for a decade, but it is more accurate that he smoked less than 50 times a year for the decade 2012 to 2022. He stopped using marijuana on January 25, 2023. He stopped because it was not treating the underlying problem, not getting enough sleep. Processing his clearance application definitely influenced his decision to stop using marijuana. He especially wanted the clearance, so that was an “extra reason” to stop. He feels he has a “better handle” on his insomnia in 2022. The tools he is using get him closer to the sleep he needs. He realizes that regardless of marijuana being legal in any specific state in this country, it remains federally illegal, and is therefore a prohibited use as a security clearance holder (Tr. 36-39.)

Applicant reaffirmed his February 7, 2024 statement substantially conforming to AG ¶ 26(b)(1) through (3) that he intends to abstain from all drug involvement and substance misuse including marijuana in the future. (Tr. 40.)

Applicant does not know if obtaining a security clearance would come with any benefits like a higher income. It would enable him to be of more use to his company to fill more roles. He would be of more risk of losing his job without a clearance. His wife knows he used marijuana, but she had no issues with him using marijuana and knew he used it to treat his insomnia. She also knew he used it recreationally with friends. Her stance now is that she does not want him to use marijuana mainly in light of the clearance issues. He believes she would help support him if he were in a position where marijuana was offered to him. He has never tested positive on an employer-sponsored drug test. He has never been arrested or cited for possession of marijuana or any other drug. He has never been diagnosed by a medical professional as having a substance abuse or marijuana addiction. He has never purchased marijuana illegally in the last five years. (Tr. 42-45.)

Applicant does not have a security clearance. He does not work with classified documents or with classified equipment. He does not do any work that exposes him to classified equipment or classified information. He did not believe or understand that he held a sensitive position. (Tr.40-46.) The Government did not provide evidence that Applicant had a need to know any classified or sensitive information, that he had executed a nondisclosure agreement encompassing classified or sensitive information, or worked with classified or sensitive information. The Government did not define what a “sensitive position” is or what specific facts of this case constitute what Applicant’s “sensitive position” was. Although the SCA uses the terms “sensitive information” and “sensitive position,” (GE 1 at 31, 33-36, 41), in four pages of single-spaced instructions, it nowhere defines those terms. (GE 1 at 2-4.) His position was as a software engineer for a federal defense contractor. (GE 1; Tr. 22.)

Law and Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard. Substantial evidence means “evidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla.” 484 U.S. at 531. Substantial evidence is a lesser burden than both clear and convincing evidence and preponderance of the evidence, the latter of which is the standard applied in most civil trials.

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of several variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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 of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H: Drug Involvement and Substance Misuse

Under Guideline H, illegal drug use may raise questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24 sets forth the concern, as follows:

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.

Marijuana is a Schedule I controlled substance, and possession of it is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>

More recently, on December 21, 2021, the Director of National Intelligence signed the memorandum, *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*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior medicinal or recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the "whole-person concept" stated under SEAD 4, to determine whether the applicant's behavior raises a security concern that has not been mitigated.

In analyzing the facts of this case, I considered the following potentially disqualifying conditions:

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

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The potentially applicable mitigating conditions under Guideline H are quoted below:

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.

Applicant's admissions establish by substantial evidence that the Government has proved a *prima facie* case that AG ¶¶ 25(a) and (f) apply. The next inquiry is whether any mitigating conditions apply.

I have considered whether mitigating condition AG ¶ 26(a) applies. Applicant's use of marijuana for both recreational purposes and to address insomnia and related physical problems spans 25 years. During that time, he used marijuana at least monthly. It was often more than monthly. According to his testimony, he last used marijuana in January 2023. His use, therefore, did not occur long ago, nor was it infrequent. Accordingly, his marijuana use is not mitigated by AG ¶ 26(a).

I have considered mitigating condition AG ¶ 26(b), which has key elements, the first of which is an acknowledgement of his drug involvement and substance misuse. During the security clearance investigative process and at his hearing, he satisfied this element. He also testified that he has disassociated himself from drug-using associates and changed or avoids environments where marijuana was used, thus satisfying the second and third elements of AG ¶ 26(b). Finally, he submitted a signed statement substantially comporting with AG ¶ 26(b)(3), and he reaffirmed that statement during his hearing testimony. The inquiry does not, however, end there.

AG ¶ 26(b) requires that an applicant has "established a pattern of abstinence." Here, Applicant's marijuana use began in about January 1998. He last used marijuana in January 2023. Thus, his period of abstinence is a mere three years compared to his quarter of a century of routine marijuana use. This observation is not meant to question the sincerity or honesty of his stated intent not to use marijuana

in the future. There are, however, good reasons to expect a longer period of abstinence.

First, during his January 3, 2023 PSI, when asked if he would stop using marijuana, he indicated that he would not stop using because it was legal in so many states. He also indicated that depending on the circumstances he might stop and would think hard about it with his current job. And this interview was conducted just days after his last use of marijuana. Second, he used marijuana to help with a sleep disorder that caused insomnia and related anxiety. He now receives treatment for his sleep disorder and feels that he has a “better handle” on his insomnia and is closer to getting the sleep he needs. Getting a clearance was an “extra reason” to stop using marijuana. Clearly, using marijuana was instrumental in coping with his years of a persistent medical problem. Under these circumstances, requiring a period of abstinence longer than three years is not unreasonable. Mitigating condition AG ¶ 26(b) does not apply.

The SOR ¶ 1(b) allegation that Applicant used marijuana while employed in a “sensitive position” requires discussion. In ISCR Case No. 22-02623 at 4 (App. Bd. Jan. 24, 2024), the DOHA Appeal Board discussed the term “holding a sensitive position.” In that case, the Board held that 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.

In this case, Applicant admitted in his Answer that he was employed in a “sensitive position” while he used marijuana. During the hearing, however, he testified that he does not have a security clearance and does not have any involvement with classified information. He did not know or understand that he held a sensitive position. In addition, the Government did not provide evidence that he had a need to know any sensitive information, that he had executed a nondisclosure agreement encompassing sensitive information, or worked with sensitive information. Significantly, the Government did not provide any evidence of what his “sensitive position” was, only that he was a software engineer for a defense contractor. In fairness, given his testimony, his admission should be deemed a denial of this allegation. Notwithstanding the broad definition of “sensitive position” quoted above, the Board has also held: “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). In this case, where Applicant had no knowledge or understanding that he held a “sensitive position” and the Government offered no proof on that issue, it is fair to conclude that the above definition of “sensitive position” was not meant to include contractors such as Applicant. SOR ¶ 1(b) has not been established

Whole-Person Concept

Under AG ¶ 2(a), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶¶ 2(a) and (d)(1)-(9) (explaining the “whole-person” concept and factors). In my analysis above, I considered the potentially disqualifying and mitigating conditions and the whole-person concept in light of all the facts and circumstances surrounding this case.

Applicant leaves me with questions about his comparatively brief pattern of abstinence from marijuana use and, therefore, his eligibility and suitability at this time for a security clearance. Therefore, I conclude that Applicant has not provided sufficient evidence to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

Conclusion

Considering all of the circumstances, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Philip J. Katauskas
Administrative Judge