



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



ISCR Case No. 22-01865

Appearances

For Government: John Hannink, Esq., Department Counsel
For Applicant: Elisabeth M. Baker-Pham, Esq.

03/21/2025

Decision

LAFAYE, Gatha, Administrative Judge:

Applicant failed to provide sufficient evidence to mitigate security concerns alleged under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 25, 2022. On November 18, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD acted under Executive Order (EO) 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended; DOD Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on March 10, 2023 and requested a hearing before an administrative judge. On June 14, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that his hearing was scheduled to be conducted by video teleconference on July 30, 2024. The hearing was convened as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 and GE 2, which were admitted in evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through AE F, also admitted in evidence without objection. I left the record open for 30 days to allow Applicant additional time to submit documentary evidence. Applicant timely offered AE G through AE P, which were admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on August 12, 2024.

Findings of Fact

In Applicant's answer to the SOR, he admitted using marijuana from September 1993 to at least March 2022, SOR ¶ 1.a, and to cultivating marijuana from September 2021 to at least March 2022, SOR ¶ 1.b. He denied having an intent to continue using and cultivating marijuana in the future. Applicant's admissions are incorporated in my findings of fact.

Applicant is 44 years old. He graduated from high school in about July 1999. In August 2020, he enrolled in a small, private, liberal arts college in a different state (S2), and completed a bachelor's degree program in business in May 2005. He married in August 2014, and does not have children. (SOR Answer; GE 1, GE 2; Tr. 30-38)

Since June 2020, Applicant has worked as an independent contractor for a defense contractor, providing services as a lighting designer and operator for live performances and events. He previously worked as a full-time lighting designer for a private company, from April 2011 until he left the organization in June 2020. He established a business as an independent contractor in about April 2014, and has worked part-time since then, providing similar lighting design and operation services to private companies and non-profit organizations. (SOR Answer; GE 1,2; Tr. at 71-73)

In March 2022, Applicant completed his first SCA, where he admitted he illegally used drugs or controlled substances from about September 1993 to at least March 2022. Specifically, he responded "yes" to questions in Section 23, Illegal Use of Drugs or Drug Activity, asking whether, in the last seven years, he had illegally used any drugs or controlled substances; and whether he intended to use this drug or controlled substance in the future. In the comments section, he disclosed that he was a "medical marijuana patient" and that he followed his prescription for daily use. In explaining his intent to continue using marijuana, he emphasized his "prescribed medical use." (GE 1 at 31)

Applicant also admitted in his SCA that he cultivated marijuana from about September 2021 to at least March 2022. He responded "yes" to both questions in SCA Section 23 asking whether, in the last seven years, he had illegally purchased, cultivated, trafficked, produced, etc. a drug or controlled substance; and whether he intended to engage in the activity in the future. In the comments, he explained that having a legal, state-compliant cannabis garden at his home where he cultivates cannabis for his personal use was more affordable and more secure than purchasing marijuana from state dispensaries. (GE 1 at 32-33; Tr. 69-70,92,135,143)

In his April 2022 DOD investigative interview, Applicant provided more details concerning his history of using marijuana, prescription opioid medications, and other drugs he experimented with, but he did not discuss his marijuana garden with the investigator. He made the following comments concerning his illegal drug use:

From my youth through my music career in college, a wide range of experimental drugs were available to me. As a teen I experimented with a range of psychedelics recreationally. Several times a year during college cocaine was used socially. Any such use ended shortly after pain medication was prescribed and I have no recollection of any use after 2007. (GE 2 at 12)

Applicant started smoking marijuana in 1993 at the age of 12 after he experienced an emotionally traumatic event. He did not understand the impact the event had on him at the time, but said his behavior and outlook completely changed, and caused him to "act out." He said he started meeting and socializing with a new crowd of 12 year-olds from his sixth-grade class who used marijuana. He occasionally used marijuana with them until he had a marijuana possession incident at school, which led to his suspension, a guilty plea in juvenile court, and supervised probation with random drug urinalysis tests for two years. Applicant said he did not use marijuana during the two-year probation period. (SOR Answer, Encl. A at 2-3; GE 1, GE 2 at 7; Tr. at 25-27)

Applicant resumed using marijuana during his sophomore year in high school, about a year after the end of his supervised probation. In 1997, his parents transferred him to a small, private school with about 50 high-school students. At the request of his parents, his new school subjected him to random drug urinalysis tests and required him to participate in drug education classes. After changing high schools, Applicant said he stopped using marijuana and became a much more focused and engaged student with noticeable grade improvements. Because of this period of abstinence, Applicant's overall marijuana use during high school was minimal. (SOR Answer, Encl. A; GE 2; Tr. 27-30,100-103)

Applicant had an opportunity to visit his prospective college in S2 with his parents before acceptance and he thought it was a good fit. He deferred entry for one year, and during his "gap year," he worked full-time as a kennel manager and surgical assistant for a veterinary clinic. He was also in a serious romantic relationship at the time. He said he probably used marijuana during the period, but that it was not a significant part of his life at that time. (Tr. 28-29,103-105)

Applicant enrolled in college in August 2000. The college he attended was known for its "very cannabis-friendly" environment, and was ranked by one source as "the most marijuana friendly college in the country." (Tr. at 29) It was located in (S2), which he said had decriminalized marijuana use in the 1970s. He denied choosing this college because of its liberal policy towards marijuana. He said most students in the community used marijuana, and that this culture of acceptance led to his increased use of marijuana during his years in attendance. Applicant's marijuana use at that time ranged from a few times

a week to a few times a month from August 2000 to about 2005. (SOR Answer, Encl. A at 4-6; Tr. 32-38,103-111,114-122,168)

In about September 2004, Applicant twisted his ankle at a social event. After several months of severe pain and multiple medical tests, doctors discovered he had "tarsal coalition," a birth condition that causes bones in the ankle to fuse together, which can cause severe pain. His doctor recommended medication to manage the pain because of the high surgical risk of becoming lame or crippled. He was initially prescribed hydrocodone to manage the pain, which worked for a while. However, as his tolerance for opioids increased, his prescription medications increased to more potent forms of opioid drugs, including Percocet, Roxicodone, and time-released Oxycontin. Over time, he developed an addiction to opioids. He said he did not recall using marijuana from late 2004 to about 2009. However, he admitted experimenting with a wide range of drugs, including psychedelic drugs and cocaine, through 2007. (SOR Answer, Encl. A; GE 2 at 12; Tr. 37-43,117-119)

In late 2009, Applicant was diagnosed with "hyperthyroidism" or Graves' disease, and was treated for the condition using radiation therapy. He said he used marijuana daily during this period to help with nausea, and to increase his appetite. He disclosed his awareness that using marijuana was illegal at the federal and state levels, but said he was more concerned about surviving the disease. He said he stopped using marijuana a few weeks after his treatment ended in 2010. He said he did not enjoy using marijuana anymore because he started to feel paranoid after using it. (SOR Answer, Encl. A; Tr. 43-45,119-123)

In September 2010, Applicant moved back to his hometown in (S1) to live with his parents. He said he decided to stop using opioids prescribed for his ankle pain, and in December 2010, he flushed his prescribed opioid medication down the toilet. Shortly afterwards, he started to experience withdrawal symptoms, which worsened over time. He was taken to the hospital and placed back on his opioid medication. He created a plan to have ankle surgery, followed by a gradual process to safely stop using opioids with his doctor's help. (SOR Answer, Encl. A; Tr. 47-52,123-125)

After tapering off his opioid use through his period of physical recovery, Applicant said his plan worked and he was able to stop using opioids altogether in late 2011. A friend helped him to find full-time work in the music industry in a neighboring state (S3). He said he started working in the music industry, first passing a six-month probationary period doing menial jobs for the company, but that he quickly moved up after lots of on-the-job training and hard work. He developed technical skills in lighting design and operation, and eventually worked his way up to lead lighting director, a physically demanding and time consuming job. Over time, his ankle pain returned, and in 2013, he was again prescribed opioid medication for pain management. He said he used marijuana on social occasions between 2010 and 2015. (SOR Answer, Encl. A; Tr. 51-52,126-130)

In 2015, Applicant resided in S3 near his workplace. He said he increased his marijuana use after S3 passed legislation allowing the recreational use of marijuana.

Applicant continued to use marijuana while taking his prescribed opioid medication until he experienced a heart attack in the spring of 2018 at the age of 37. He said his heart attack caused him to prioritize his health over his work in the music industry. (SOR Answer, Encl. A at 14; Tr. 54-60)

Applicant decided to stop using opioid medications for good in December 2019. He found a new doctor (Dr. H), and she diagnosed him with opioid use disorder (OUD) from the opioid drugs prescribed to him starting in 2004. (SOR Answer Encls. A,C; AE A) Dr. H prescribed him Suboxone at a dose of 16 mg per day, to start the process of tapering his use and dependence on opioids. Over time she was able to reduce his daily Suboxone dosage from 16 mg to about 4 mg. He currently takes about 4 mg per day and visits with Dr. H monthly. (SOR Answer, Encl. A,C; Tr. 61-64,86-87,92,131,135)

In 2016, Applicant moved back to S1 to reside closer to his parents. In January 2020, Applicant resumed using marijuana, this time daily, to help manage his pain. Before the law changed in S1, he purchased marijuana from dispensaries in S3, traveled with it to his residence in S1, and used it to self-medicate. He said he believed that S1 had decriminalized marijuana possession for personal use by limiting penalties for possession to a very small citation, if any citation was written at all. (GE 1; Tr. at 132)

In May 2020, Applicant obtained a medical marijuana card issued through a medical marijuana pharmacist and healthcare advisor in S1. (AE I-AE P) He was prescribed 3.5 grams of medical marijuana for daily use. (SOR Answer, Encl. A at 16). In July 2021, S1 changed its laws to permit the recreational use of marijuana. Applicant said S1 also permitted residents to grow and cultivate marijuana in a personal garden, and that he started his own personal marijuana garden in September 2021. (SOR Answer, Encl. A; GE 1; Tr. 65-71)

Applicant disclosed his use of medical marijuana to the defense contractor before he started working with the team in June 2020. The defense contractor's chief executive officer (CEO) who also worked as the facility security officer (FSO), confirmed his statement. The CEO determined Applicant's use of medical marijuana did not pose a security risk for the organization because he did not need a security clearance to perform the job at that time. Applicant provided a copy of his medical marijuana card to the company and remained subject to the company's drug urinalysis testing program. (SOR Answer, Encls. A,C; AE I-AE P; Tr. 71-74,81-82)

Before completing his March 2022 SCA, Applicant said the defense contractor informed him that his medical marijuana use would not prohibit him from being eligible for a security clearance. Moreover, a previous legal counsel, also, failed to inform him that using medical marijuana would prohibit him from being eligible for a security clearance. In his October 2022 response to interrogatories, Applicant said he answered "yes" to the question of whether he intended to continue using medical marijuana in the future because he did not know or appreciate that using medical marijuana was disqualifying for security clearance eligibility. (SOR Answer, Encls. A,C;GE 2 at 11; Tr. 81-84)

Applicant said he responded to questions in the SCA and his background interview in an open and honest manner, and that he was surprised to receive an SOR for using and cultivating medical marijuana with the intent at that time to continue doing the same in the future. After receiving the SOR, and discussing what it meant with a family member and lawyer, Applicant said he understood for the first time that his use and cultivation of medical marijuana was disqualifying for security clearance eligibility. He decided to stop, and said he would have done so earlier had he known that using medical marijuana is disqualifying for security clearance eligibility. (SOR Answer, Encls. A,C; Tr. 84-87)

In January 2023, Applicant consulted both Dr. H and his marijuana pharmacist before stopping his medical marijuana use. Dr. H informed him that she did not need to increase his Suboxone dosage to anything higher than 4 mg per day. His medical marijuana pharmacist provided guidance on tapering and safely stopping marijuana use in about a two-week period. He was not diagnosed with marijuana use disorder. (Tr. at 95) He said he destroyed his marijuana cultivation garden, allowed his medical marijuana certificate to expire, and informed his friends and acquaintances that he stopped using medical marijuana and could no longer be around it. He last used medical marijuana on February 1, 2023. In March 2023, he signed a statement of intent to abstain from all illegal drug involvement and substance misuse, with an understanding that any future involvement or misuse would be grounds for revocation of security clearance eligibility. He has voluntarily taken and passed drug tests measuring the presence of synthetic cannabinoid taken in May 2023, July 2024, and August 2024. (SOR Answer, Encls. A,C; AE E-AE H; Tr. 87-96)

Applicant submitted character letters and awards received for his performance while supporting high-level military ceremonies and events. The CEO attested to his exemplary performance of duties, professionalism, reliability, trustworthiness, and his respect for rules. Applicant received award coins commemorating his outstanding performance of duties in high-level military ceremonial events, including the retirement ceremony of Army General Mark Milly, the 20th Chairman of the Joint Chiefs of Staff (CJCS) and the promotion of the 21st CJCS, Air Force General Charles Q. Brown, in the same ceremony. He also received an award coin in 2021 for his participation in the 59th Presidential Inauguration ceremony of President Joseph Biden. Letters from colleagues and others praised Applicant's consistent support and encouragement of peers, his reliability, and his respect towards others. His family members praised and attested to his commitment to abstaining from all future marijuana use, his dedication to his work, his respect for the DOD mission, and the high standards required of him. (SOR Answer, Encl. C; AE B - AE D) Two former colleagues testified favorably on his professional knowledge, reliability, and trustworthiness, and favorably endorsed his application for a security clearance. (AE E,F; Tr. 75-80,171-186)

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*, 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. 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*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is described 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable include:

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

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

AG ¶ 25(g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant's admissions and the evidence in this case establish that he used and cultivated marijuana during the periods described, and expressed his intent to continue using and cultivating marijuana in the future. AG ¶¶ 25(a), 25(c), and 25(g) are applicable.

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 fully established. This is Applicant's first time going through the security clearance process. He admitted and testified credibly concerning his 29-year history of marijuana use starting at the age of 12. He disclosed his medical marijuana use to his CEO/FSO, requested guidance, and was unknowingly misguided to his detriment about the consequences of using marijuana before he accepted the position, and before he started the SCA process. His decision to continue using and cultivating medical marijuana in the future was based on the same faulty information received from his defense contractor CEO/FSO, and a former legal advisor who retired before the SOR was issued. It was not wrong for Applicant to rely on the advice of his CEO/FSO to his detriment. He signed a statement of intent to abstain from all illegal drug involvement and substance misuse in the future and credibly testified concerning his stated intent.

The CEO/FSO did not explain the disqualifying nature of illegal drug use for anyone seeking access to classified information, past, present and future. Applicant credibly testified that he did not understand that using any federally illegal drug, including marijuana, is disqualifying for individuals seeking a security clearance. He expressed his belief that he could continue using medical marijuana as prescribed by his pharmaceutical advisor, consistent with the laws in S1. It was only after he received the SOR in December 2022, and vetted it with a legal advisor, that he understood using any federally illegal drug is disqualifying for security clearance eligibility. He took steps to taper off his marijuana use to avoid interference with his prescription Suboxone. He advised friends and acquaintances that he could no longer participate in, or be in the presence of marijuana, and he last used marijuana on February 1, 2023, almost 26 months ago. Applicant successfully established he has no future intent to use or cultivate marijuana.

Applicant is clearly on the right path to abstaining from drug involvement and substance misuse. However, I must also consider his 29-year history of illegal marijuana use and involvement in three states, and his awareness and knowledge that marijuana was then and is now, illegal under federal law. I weighed Applicant's history of marijuana use and involvement against his abstinence of almost 26 months, and concluded that not enough time has passed to find that his marijuana use and involvement is completely behind him and that full rehabilitation has occurred. I commend the progress he has made and encourage his continuance on this path towards success.

AG ¶ 26(b) is not fully established. Appellant acknowledged his marijuana use, successfully abstained from using marijuana for almost 26 months, and is well on his way to establishing a pattern of abstinence. He disassociated himself from other marijuana users, changed or avoided the environment where marijuana was used, and provided a signed statement of intent acknowledging that any future illegal drug involvement or misuse would be grounds for revocation of security clearance eligibility. However, as stated in AG ¶ 26(a), not enough time has passed to fully mitigate illegal drug involvement and substance misuse security concerns raised by the evidence in this case. Given Applicant's 29-year history of drug involvement and substance misuse, his evidence is insufficient to overcome concerns and doubts about his judgment, reliability, and his willingness to comply with laws, rules, and regulations.

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 relevant 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), 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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. Many of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

I had the opportunity to observe Appellant's demeanor during the hearing and found him credible though some facts were forgotten. I carefully weighed the favorable evidence, particularly the favorable recommendation by the CEO/FSO and others, including two witnesses who testified favorably on his behalf. I considered the periods of time Applicant used and stopped using marijuana, regardless of its illegality, to include periods when he was using more potent forms of opioid prescription medication as his tolerance to the drug increased. Before his heart attack in early 2018, Applicant increased his marijuana use due to its decriminalization in S3, although he was using more potent forms of opioid prescription medication by that time. After a period of time, he resumed using marijuana.

After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all evidence in the whole-person context, I conclude Applicant failed to mitigate Guideline H 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, 1.b: Against Applicant (except as to future intent)

Conclusion

It is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Gatha LaFaye
Administrative Judge