



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 24-00606

Appearances

For Government: William Miller, Esq., Department Counsel

For Applicant: *Pro se*

06/25/2025

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 25, 2023. On May 23, 2024, the Defense Counterintelligence and Security Agency (DCSA) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. 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 June 13, 2024, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on November 11, 2024. The case was assigned to me on April 2, 2025. On April 15, 2025, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on May 28, 2025. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 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 June 11, 2025.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a, 1.b, and 1.c, with explanations. He denied the allegation in SOR ¶ 2.a. His admissions are incorporated in my findings of fact.

Applicant is a 48-year-old creative director overseeing 16 other graphic designers. He has been self-employed for much of his career. He was employed by a federal contractor from September 2016 to December 2016. He earned an associate degree in December 1999 and a bachelor's degree in May 2001. He married in October 2019. He has one adult stepchild.

Applicant has never held a security clearance. He submitted an SCA while employed by a federal contractor in September 2016. In that SCA, he answered "No" to a question asking if, during the last year, he had used, possessed, supplied or manufactured illegal drugs. At the hearing, he testified he answered "No" to the question because at that time he was actively seeking a security clearance and had stopped using marijuana. (Tr. 17) In his 2023 SCA, he explained that his application for a clearance was withdrawn because the contractor needed someone with a current clearance immediately. (GX 2 at 19)

SOR ¶ 1.a alleges that Applicant used marijuana with varying frequency from about 1995 until at least April 2024. When Applicant responded to the SOR in June 2024, he admitted this allegation, and explained that there have been long periods, including times when he was working as a contractor in 2016, when he did not use it.

When Applicant submitted another SCA on September 25, 2023, he disclosed that he had ingested and smoked substances containing THC from May 1995 to July 2023, "only under legal circumstances at my home." He stated that he intended to use marijuana with his wife, who has stage 2 colon cancer, but that he does not intend to use it if his security clearance does not allow it. (GX 1 at 55) In this SCA, he did not mention abstinence from marijuana in 2015 and 2016.

When Applicant was interviewed by a security investigator in November 2023, he disclosed that he used marijuana from 1995, when he was in college, until 2001. He stated that he did not use marijuana from 2001 to 2009, but resumed his use of marijuana in 2010 and used it once or twice a month until 2019. He did not mention any abstinence from marijuana use in 2015 and 2016. He told the investigator that when his wife was diagnosed with cancer and prescribed medical marijuana for pain relief, he increased his

use to once or twice a week. He was still using marijuana at the time of the security interview. He told the investigator that he will stop using marijuana while holding a security clearance, but he will resume use if he is not granted a clearance. (GX 3 at 4)

In Applicant's response to DOHA interrogatories in April 2024, he verified the accuracy of the summary of his November 2023 interview. However, at the hearing, he testified that the summary of the November 2023 interview was inaccurate because he stopped using marijuana in 2015, after he had applied for a clearance. He testified that he resumed his marijuana use in 2019, when his wife was diagnosed with cancer, to deal with depression and sleep deprivation. (Tr. 17) During cross-examination, he testified that he last used marijuana on May 2, 2025, less than a month before the hearing. He testified that he has stopped using marijuana because he is training for a triathlon. When asked if he intends to resume using marijuana after the triathlon, he responded, "It's not that I would immediately start after the race. It's something that I don't need to do. It's just something that I've used in the past to help cope with depression or sleep apnea." (Tr. 20-22)

SOR ¶ 1.b alleges that Applicant intends to continue his marijuana use in the future. Applicant admitted this allegation, explaining that his doctor has recommended marijuana as a natural remedy for depression, insomnia, and joint pain, and that he does not desire to become reliant on prescription medications such as Xanax or Ambien. He also stated, "If this is a hindrance to my ability to obtain and hold a clearance, then I will cease future use and agree to drug screens." He also told a security investigator that he will stop using marijuana while holding a clearance, but that he will resume using it once he longer has a clearance, because he enjoys it. (GX 3 at 4)

SOR ¶ 1.c alleges that Applicant cultivated marijuana from about 2021 until at least November 2023. Applicant admitted this allegation and explained that he began cultivating marijuana when his wife was diagnosed with cancer and prescribed medical marijuana. He chose to cultivate marijuana to make sure it was being grown organically and without pesticides. He testified that he grew two plants between 2021 and October 2024, but he has stopped cultivating them because his wife was not using them and they were a lot of work. (Tr. 20-22)

SOR ¶ 2.a alleges that Applicant falsified his September 2016 SCA when he answered "No" to the question, "In the last year, have you used, possessed, supplied, or manufactured illegal drugs?" and that he failed to disclose the information alleged in SOR ¶ 1.a. In his answer to the SOR, Applicant denied falsifying this SCA. He stated that when he was asked this question, he was employed by a federal contractor, knew that he would be asked about and screened for drug use, and did not use marijuana again until after his employment by the federal contractor had ended. His explanation in his SOR answer and at the hearing is consistent with the information reflected in his September 2016 SCA and during his security interview in November 2023. This allegation is not established.

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

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.

Applicant's admissions establish the following disqualifying conditions under this guideline:

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.

As of the date of the hearing, Applicant was still a user of marijuana who promised to stop using in the future *if* he received a clearance. His situation is different from that of an applicant who stopped using marijuana before applying for a clearance.

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.

Neither of these mitigating conditions are established for Applicant's marijuana use. It was recent, frequent, and was not under circumstances making it unlikely to recur. He has acknowledged his drug involvement but has no intention of terminating it.

Both mitigating conditions are established for Applicant's cultivation of marijuana plants. He credibly testified that he stopped growing them in October 2024 because his wife was not using them and they were too much work.

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 require 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. . . .

I have considered the SecEA guidance and applied the “whole-person concept” in my discussion below. Applicant is not the type of marijuana user contemplated by the SecEA guidance, *i.e.*, a former recreational marijuana user who is willing to discontinue illegal marijuana use. He has made it clear that he will continue his illegal use of marijuana if he does not receive a clearance or if he no longer needs a security clearance.

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 Guidelines H and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under those guidelines and evaluating all the evidence in the context of the whole person, I conclude Applicant refuted the allegation that he falsified his September 2016 SCA, but he 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
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Paragraph 2, Guideline E (Personal Conduct)

FOR APPLICANT

Subparagraph 2.a:

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