



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



Appearances

For Government: Alison P. O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/28/2025

Decision

LAFAYE, Gatha, Administrative Judge:

Applicant failed to provide sufficient evidence to mitigate security concerns raised 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 December 29, 2023. On August 30, 2024, 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 September 27, 2024, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on November 19, 2024, including documents marked as Items 1 and 2. On December 11, 2024, a complete copy of the file of relevant material (FORM)

was provided to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on December 11, 2024, and did not submit a response. The case was assigned to me on February 18, 2025. Items 1 and 2 are admitted in evidence without objection.

Findings of Fact

In his Answer, Applicant admitted all allegations in the SOR (SOR ¶¶ 1.a through 1.c). His admissions are incorporated in my findings of fact. After careful review of the evidence, I make the following additional findings of fact.

Applicant is 44 years old. He enrolled in college in September 1999, and earned a bachelor's degree in engineering, in May 2004. In September 2004, he worked for a federal contractor for two months, providing support on a Federal Emergency Management Agency (FEMA) contract during the hurricane season.

In July 2006, Applicant accepted a full-time position, working as a controls engineer for a private company. In March 2017, he was promoted to power systems project engineer, where he remains a full-time employee. In December 2023, Applicant began working as a part-time consultant with the defense contractor currently sponsoring his security clearance application.

Applicant married in 2008. He and his wife welcomed four children: three sons, born in 2011, 2012, and 2015; and a daughter born in 2018. In about 2021, their second child passed away. Both Applicant and his wife have experienced extended periods of depression and anxiety following the death of their child. (Items 1,2)

Applicant completed his first SCA in December 2023, and responded "yes" to questions in Section 23, Illegal Use of Drugs or Drug Activity, which asked 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. Applicant admitted he illegally used marijuana from April 2021 to December 2023, and commented as follows:

In accordance [with] the recommendation of my board-certified medical physician and provided by a [state] licensed dispensary to me, a [state] board of pharmacy registered cannabis patient: since being licensed in the spring of 2021 I have consumed a low dosage edible THC for management of PTSD anxiety, approximately 2 times/month. (Item 1 at 28-29)

He also responded "yes" to the question of whether he intends to use this drug or controlled substance in the future, explaining:

I intend to continue to follow the recommendations of my board-certified medical physician for my healthcare, whereby THC usage and distribution is legal in [state]. (*Id.*)

Under Guideline H, the SOR alleges that Applicant used marijuana from about April 2021 to present (SOR ¶ 1.a); he purchased marijuana from April 2021 to present (SOR ¶ 1.b); and he intends to continue using marijuana in the future (SOR ¶ 1.c). In his answer, Applicant admitted all allegations, and submitted a copy of the state license authorizing him to purchase and use marijuana. He commented as follows:

I admit these claims are true. However, I don't believe they apply to Guideline H. [State law] legalizes board-certified medical doctors to certify patients' use of cannabis products, i.e. tetrahydrocannabinol. I have only ever acquired and used THC products by my doctor's certification, after licensed by first the [state] department of health and later by the [state] cannabis control authority, purchasing only from state-certified dispensaries, legally, as outlined by my state, and only following the advice of my doctor. (SOR Answer)

Applicant also said he is a "law-abiding citizen" who had "nothing to hide." His cannabis license, which was issued by his state on March 27, 2021, and expired April 30, 2022, listed the "license type" as a "registered patient for cannabis oil." (*Id.*)

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." EO 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.” EO 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 “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 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. See also AG ¶ 2(b).

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 purchased and used marijuana, with the intent to continue purchasing and using marijuana in the future. AG ¶¶ 25(a), 25(c), and 25(g) apply.

The following mitigating condition is 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.

AG ¶ 26(a) is not established. Applicant began purchasing and using marijuana in April 2021, after the death of his child, a difficult circumstance for any parent. He undoubtedly suffered unimaginable emotional pain, sought medical advice, and his physician recommended and prescribed marijuana to help manage his symptoms of depression and anxiety. After satisfying his state's marijuana licensing requirements, he has continued to use marijuana about twice per month since he started in April 2021. He purchases marijuana once every few months from a state-licensed dispensary, and he intends to follow this pattern of purchasing and using marijuana indefinitely.

Applicant had the opportunity to explore alternative treatment options with his physician to avoid the use of marijuana to treat his symptoms; he also had the opportunity to cease purchasing and using marijuana; and to submit the discovered information with his answer to the SOR or as evidence in this FORM. However, he did not do so.

Applicant's purchase and use of illegal drugs, and his intent to continue to do so into the indefinite future raise questions and doubts about his judgment, reliability, trustworthiness, and overall willingness to comply with laws, rules, and regulations. He has not mitigated the security concerns raised by his conduct.

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.

I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d), above. After weighing the disqualifying and mitigating conditions under Guideline H and evaluating all evidence in the whole-person context, I conclude Applicant has 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.c: Against Applicant

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