



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



In the matter of: )  
 )  
----- ) ISCR Case No. 20-01605  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Raashid Williams, Esq., Department Counsel  
For Applicant: *Pro se*

10/18/2021

**Decision**

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate drug concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

**Statement of the Case**

On October 2, 2020, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse guideline the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); 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.

Applicant responded to the SOR (undated), and requested a hearing. The case was assigned to me on July 6, 2021. A hearing was scheduled for July 26, 2021, and heard on the date as scheduled. At the hearing, the Government's case consisted of two exhibits. Applicant relied on one witness (himself) and one exhibit. The transcript (Tr.) was received on August 11, 2021.

### **Procedural Issues**

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with a statement of intent not to use illegal drugs in the future. For good cause shown, he was granted three days to supplement the record. Within the time permitted, Applicant supplemented the record with a statement of intent not to use drugs in the future, and agreed to an automatic revocation of his security clearance eligibility should he return to future drug use. Applicant's submission was admitted without objections as Applicant's AE A.

### **Summary of Pleadings**

Under Guideline H, Applicant allegedly (a) used marijuana and other illegal substances, with varying frequency, between March 2015 and February 2019; (b) purchased marijuana and other illegal substances between March 2015 and April 2019; (c) sold marijuana with varying frequency from approximately 2015 to 2016; and (d) used prescription medications not prescribed between November 2015 and February 2019.

In his response to the SOR, Applicant admitted all of the allegations with explanations. He claimed to have used marijuana and other illegal drugs, as well as prescription drugs not prescribed to him, while in college and claimed to have quit using them altogether after graduating from college in May 2019. He claimed that since he moved home following his graduation and got a job with his current employer, he is no longer in a college environment and has disassociated from people he has shared drugs with.

### **Findings of Fact**

Applicant is a 24-year-old project engineer for a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

#### **Background**

Applicant has never married or entered into a legally recognized domestic partnership and has no children. (GE 1) He earned a bachelor's degree in electrical engineering from a recognized university in May 2019. (GE 1; Tr. 17, 22) He reported no military service.

Since June 2019, Applicant has been employed by his current defense contractor as a project engineer. (GE 1; Tr. 16-17, 21) Previously, he worked part-time jobs for other non-defense employers. (GE 1) Although both of his parents have held clearances, he has never held a security clearance. (GEs 1-2 ; Tr. 14)

### **Applicant's drug history**

Between March 2015 and May 2019 (while he was in college), Applicant used multiple illegal drugs and prescription drugs with varying frequency that were not prescribed for him. (GEs 1-2) Drugs of choice that he experimented with at social events over his four years of college attendance included the following: marijuana, inhalants, cocaine, hallucinogenics (inclusive of mushrooms and LSD), stimulants (inclusive of ecstasy), MDMA ("molly"), PCP, ketamine, and prescription medications not prescribed to him (Hydrocodone, Codeine, Promethazine, Adderall, Vyvanse, Ritalin, and Xanax). (GEs 1-2)

In addition to using illegal drugs and prescription drugs not prescribed to him, Applicant purchased and sold marijuana with varying frequency between March 2015 and November 2018. (GEs 1-2) When asked about his past drug use in the electronic questionnaire for investigations processing (e-QIP) he completed in July 2019, and again in his personal subject interview (PSI) conducted in August 2019, he was fully forthcoming with his voluntary disclosures of his past drug use.

Throughout his four years of college, Applicant increased his drug use to almost daily before reaching his senior year. (GE 2) Attributing his extensive drug use to peer pressure from members of his fraternity, he tapered off his extensive drug use in his senior year. (GE 2; Tr. 18-19) In the beginning, the drugs he used relaxed him, and as he matured, they made him feel uneasy. After graduating in May 2019, and leaving school to move back home and obtain full-time professional employment, he gave up illegal and non-prescribed prescription drugs altogether. (GE 2; Tr. 15-16, 23) Applicant continues to reside with his parents and has remained abstinent from all illegal drugs and non-prescribed prescription drugs. (Tr. 16, 31-32)

Applicant attributed his drug activity in college to his desires to eliminate his anxiety and improve his ability to stay focused on his studies. (GE 2; Tr. 19) His drug use did not cause him any financial or other personal strains in his academic life. (GE 2) Most of the drugs he acquired were from other students on campus who sold drugs, or from friends and acquaintances who shared drugs with him at campus fraternity parties. (GE 2; Tr. 15) He has never manufactured drugs and only sold marijuana, and not for profit. Applicant has never tested positive for illegal drugs and was last tested for illegal drugs by his employer in February 2019 as a part of his application process. (Tr. 27)

Applicant has not socialized or worked with anyone who uses illegal drugs since graduating from college in May 2019, with one exception: he has a tennis partner and former high school friend, who he believes uses marijuana. (GE 2; Tr. 23-24, 29-30) Since giving up illegal and non-prescribed prescription drugs, "his anxiety has pretty much disappeared." (Tr. 19)

Applicant completed a post-hearing letter of intent in July 2021. (AE A) In his intent letter, he assured he has not used marijuana or any other illegal or non-prescribed drug since May 2019. He agreed to revocation of his security clearance eligibility should he ever breach his promise to abstain from illegal drug use in the future, regardless of whether these drugs are legal in any particular state. (AE A) Asked at hearing whether he could foresee any circumstances in the future where he might be persuaded to return to illegal or non-prescribed prescription drugs, Applicant assured he could not. (Tr. 32)

Randomized drug counseling and random drug testing might have helped to assess and narrow the recurrence risks that Applicant faces, but were not furnished. Endorsements from his supervisor, coworkers, friends, and his parents who are familiar with his work performance and social habits away from work might have been helpful, too, in assessing the strength of his abstinence convictions, but were not provided. With so many years of multiple drug use and only two years of assured abstinence from illegal and non-prescribed prescription drugs to work with, more corroborating documentation was needed from Applicant to facilitate full and accurate assessments of his recurrence risks in the foreseeable future.

### **Policies**

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “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 AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

### **Drug Involvement**

*The Concern:* The illegal use of controlled substances, to include the misuse of 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.

### **Burdens of Proof**

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. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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 (4<sup>th</sup> 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**

Security concerns are raised over Applicant’s multiple use, purchase, and sale of illegal drugs and non-prescribed prescription drugs over a four-year span while he was an engineering student in college (2015-2019). Considered together, Applicant’s involvement with illegal drugs and non-prescribed prescription drugs raise security concerns over whether Applicant’s actions reflect pattern misbehavior incompatible with the judgment, reliability, and trustworthiness requirements for gaining access to classified information.

Applicant’s admissions to using illegal drugs and non-prescribed prescription drugs raises security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, two disqualifying conditions (DCs) of the AGs for drug involvement apply to Applicant’s situation: DC ¶¶ 25(a), “any substance misuse,” and 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of Illegal drugs or drug paraphernalia.”

To his credit, Applicant has committed to sustained abstinence from all involvement in illegal drugs and non-prescribed prescription drugs since his college graduation in May 2019. For over two years, he has remained abstinent from illegal and non-prescribed prescription drugs and exhibits no visible signs or indications of

succumbing to any risks or pressures he might encounter to return to illegal drug use in the foreseeable future.

Moreover, Applicant has exhibited candor about his past involvement with illegal and non-prescribed prescription drugs, as well as his past associations with friends and contacts involved in illegal drug activities and has shown marked improvement in his judgment and maturity level in the two years he has been away from the college environment that produced so much peer pressure from members of his fraternity and other contacts to engage in illegal drug activity.

Applicant's assurances of sustained abstinence from illegal and non-prescribed drug use are encouraging. And, his efforts warrant some application of two mitigating conditions (MCs) of the drug involvement guideline: MC ¶¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," and 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."

Without more time to establish a probative pattern of sustained abstinence from the use of illegal and non-prescribed prescription drugs, none of the mitigating conditions are fully available to Applicant at this time. With only two years of demonstrated abstinence from illegal and non-prescribed prescriptive drugs, more time with more corroborating evidentiary sources to support his continued abstinence are needed to facilitate safe predictions that he is no longer a recurrence risk.

### **Whole-person assessment**

From a whole-person perspective, Applicant has established independent probative evidence of his overall honesty, trustworthiness, maturity and good judgment required of those who seek eligibility to hold a security clearance or sensitive position. He lacks enough positive reinforcements and time in abstinence, however, to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole at this time, there is insufficient probative evidence of sustainable mitigation in the record to make safe predictable judgments about his ability to avoid illegal and non-prescribed prescription drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's drug activities over a four-year period with only two years of sustained abstinence, he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶1.a-1.r.

