



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



In the matter of: )  
)  
) ISCR Case No. 20-03210  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: *Pro se*

04/08/2022

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant has a lengthy history of marijuana use, and he used cocaine twice. His marijuana use is too recent to be fully mitigated; however, his cocaine use is not recent. Security concerns arising under Guideline H (drug involvement and substance misuse) are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 29, 2020, Applicant completed and signed his Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On December 7, 2020, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; 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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guideline H. (HE 2) On December 28, 2020, Applicant responded to the SOR and requested a hearing. (HE 3)

On February 27, 2021, Department Counsel was ready to proceed. Processing of the case was delayed due to the COVID-19 pandemic. On November 19, 2021, the case was assigned to me. On January 6, 2022, DOHA issued a notice of hearing, setting the hearing for February 9, 2022. (HE 1) His hearing was held as scheduled in the vicinity of Arlington, Virginia using the Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered two exhibits, which were admitted without objection. (Tr. 14-15; Government Exhibits (GE) 1-GE 2) Applicant did not offer any documents. (Tr. 10, 15) On February 18, 2022, DOHA received a transcript of the hearing. No post-hearing documents were submitted.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a and 1.b. (HE 3) His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 32-year-old manufacturing engineer. (Tr. 6, 8) In 2008, he graduated from high school, and in 2012, he was awarded a bachelor's degree in mechanical engineering. (Tr. 7) He has never served in the military. (Tr. 7) In 2018, he married, and he has a four-month-old son. (Tr. 8) He has worked for a defense contractor for five years. (Tr. 9) He has not held a security clearance. (Tr. 9)

### **Drug Involvement and Substance Misuse**

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from August 2008, to about June 2020. (HE 2) SOR ¶ 1.b alleges that he used cocaine on various occasions from about December 2015 to April 2019. (*Id.*)

Applicant's SCA and Office of Personnel Management (OPM) personal subject interview were consistent in their descriptions of his involvement with marijuana and cocaine. (GE 1; GE 2) He began using marijuana in 2008 when he was 19 years old. (Tr. 16) He averaged marijuana use about four times a year until he began working for his current employer. (Tr. 17) After he began working for his current employer in October 2016, he reduced his marijuana use to about twice a year. (Tr. 17) He took a drug test when he began working for the government contractor, and the company has a policy against illegal drug use. (Tr. 18) He was unaware of his employer's precise rules concerning illegal drug use; however, he knew his employer prohibited use of marijuana and cocaine. (Tr. 18, 26) He continues to associate with the friends who used marijuana with him; however, they do not use marijuana in his presence. (Tr. 18, 21) His spouse does not use marijuana. (Tr. 18, 23) He does not have any marijuana in his house or car. (Tr. 23)

Applicant used marijuana twice in 2019, and once in 2020, and his most recent marijuana use was in June 2020. (Tr. 19, 24; GE 1 at 47) When someone offers marijuana to him, for example at a party, he declines the offer to use marijuana. (Tr. 21) He has family or friends who use marijuana.

Applicant used cocaine once in about December 2015 and once in about April 2019. (Tr. 22; GE 1) He used the cocaine at a dance club and at a bachelor party. (Tr. 23-24; GE 1)

Applicant said he stopped using illegal drugs because he has a son. (Tr. 22) He has never had any drug-related counseling or treatment. (Tr. 25) He has never been arrested for a drug-related offense, and he has not tested positive in any urinalysis for use of illegal drugs. (GE 1; GE 2) He does not intend to use illegal drugs in the future. (Tr. 22)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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, *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 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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the

President, Secretary of Defense, and Director of National Intelligence 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. 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 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**

### **Drug Involvement and Substance Misuse**

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

DNI Memorandum ES 2014-00674, “Adherence to Federal Laws Prohibiting Marijuana Use,” October 25, 2014, 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.

Recently, the Security Executive Agent (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 requires 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. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.<sup>1</sup>

AG ¶ 25 provides two conditions that could raise a security concern and may be disqualifying in this case: "(a) any substance misuse (see above definition)"; and "(c) illegal possession of a controlled substance. . . ." The record establishes AG ¶¶ 25(a) and 25(c). Additional information is contained in the mitigation section, *infra*.

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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;

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<sup>1</sup> *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*, dated December 21, 2021 (SecEA Clarifying Guidance), at page 2.

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

None of the mitigating conditions fully apply; however, Applicant provided some important mitigating information. He voluntarily disclosed his marijuana and cocaine possession and use on his SCA, during his OPM interview, in his SOR response, and at his hearing. He has never tested positive for use of illegal drugs. He has never been arrested for a drug-related offense. He indicated he was willing to abstain from future marijuana and cocaine possession and use.

The evidence against mitigation is more persuasive at this time. In ISCR Case No. 16-03460 at 4 (App. Bd. May 24, 2018), the applicant had a history of marijuana use, and the Appeal Board said:

A clearance adjudication is aimed at determining if an applicant has the requisite judgment and reliability to abide by rules designed to protect classified information. . . . [Security concerns arise if] there is doubt as to whether he [or she] will follow the regulatory requirements for handling classified information, which might, in the event, appear burdensome. Access to national secrets entails a fiduciary duty to the U.S. A person who enters into such a fiduciary relationship is charged with abiding by legal and regulatory guidance regardless of whether he or she believes that guidance to be wise.

Possession of a Schedule I or II controlled substance is a federal criminal offense. Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance, and cocaine is a Schedule II controlled substance. See Drug Enforcement Administration, *Drug Scheduling* listing at <https://www.dea.gov/drug-information/drug-scheduling/>. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

Applicant possessed and used marijuana and cocaine even though he was aware that his defense contractor employer had a rule prohibiting involvement with illegal drugs. He knew possession of marijuana and cocaine were illegal. An applicant who uses illegal drugs after having been placed on notice of its employment or security significance “may be lacking in the qualities expected of those with access to national secrets.” See generally ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) (“An applicant’s misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability”)). Applicant has family and friends who use marijuana, and it is likely that he will be in the vicinity of marijuana in the future.

Applicant used cocaine once in December 2015 and once in April 2019. His cocaine use is not recent. He used marijuana from August 2008, to about June 2020. His marijuana use is recent. More time without marijuana use must elapse before I will be able to confidently rule out future marijuana use. Guideline H security concerns are not mitigated at this time.

### **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 the 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), “[t]he 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. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 32-year-old manufacturing engineer. In 2012, he was awarded a bachelor’s degree in mechanical engineering. In 2018, he married, and he has a four-month-old son. He has worked for a defense contractor for five years. He has never held a security clearance.

Applicant disclosed his marijuana and cocaine possession and use on his SCA, during his OPM interview, on his SOR response, and at his hearing. An honest and candid self-report of drug abuse is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation. However, the mitigating weight of Applicant’s disclosures is undermined by his marijuana and cocaine possession and use after going to work for a defense contractor with a policy against illegal drug use. His marijuana use as recently as June 2020 is too recent to be fully mitigated at this time.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. “[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant’s eligibility for access to classified information.” ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board’s jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate drug involvement and substance misuse 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant



## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge