



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



In the matter of: )  
 )  
----- ) ISCR Case No. 19-02843  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Kelly M. Folks, Esq., Department Counsel  
For Applicant: *Pro se*

11/28/2022  
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**Decision**  
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WESLEY, ROGER C. Administrative Judge

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

**Statement of the Case**

On May 1, 2020, the Department of Defense (DoD) Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance abuse and psychological conditions guidelines the DCSA 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 on October 25, 2021, and elected to have his case decided on the basis of the written record, in lieu of a hearing. Applicant received the File of Relevant Material (FORM) on April 28, 2022, and interposed no objections to the materials in the FORM. He timely supplemented the record with a letter of explanation that was received without objection as Item 6. The case was assigned to me on June 22, 2022.

### **Summary of Pleadings**

Under Guideline H, Applicant allegedly (a) purchased and used marijuana with varying frequency, from about May 2011 to at least July 2017; (b) purchased and used LSD with varying frequency from 2015 to about 2016; (c) purchased and used Psilocybin Mushrooms and other hallucinogens with varying frequency, from about August 2014 to about 2017; (d) purchased and used cocaine on at least one occasion in July 2014, and (e) purchased and used MDA on at least one occasion in July 2014.

Under Guideline I, Applicant allegedly was evaluated by a licensed psychologist in October 2020 and based on background information, a clinical interview and observations, and an objective personality assessment, was diagnosed with major depression disorder (moderate, recurrent), alcohol use disorder (moderate), cannabis use disorder, in sustained remission, and other hallucinogenic use disorder (moderate, in sustained remission). Allegedly, Applicant's diagnosed condition were considered by his evaluating mental health provider to pose a significant risk to his judgment, reliability, or trustworthiness concerning classified information.

In his response to the SOR, Applicant admitted all of the allegations with explanations and clarifications. He claimed he was never diagnosed with dependency, and he has no desire to abuse anything illegal in the future. His answers, as such, reflect unqualified admissions.

### **Findings of Fact**

Applicant is a 29-year-old 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 and has no children. (Items 3-4) He currently cohabitates with his girlfriend. He earned a high school diploma in May 2011 and bachelor's degrees in aerospace and electrical engineering in December 2017. (Item 4) He reported no military service and has never held a security clearance.

Since March 2018, Applicant has been employed by his current defense contractor employer. (Item 4) Previously, he worked for other employers in various

research positions. He reported intermittent periods of unemployment between August 2011 and March 2018. (Item 4)

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

Throughout his college years (2014-2017), Applicant used and purchased illegal drugs for his personal use. Records document that he purchased and used marijuana with varying frequency, from about May 2011 to at least July 2017; purchased and used LSD with varying frequency from 2015 to about 2016; purchased and used Psilocybin Mushrooms and other hallucinogens (inclusive of LSD) with varying frequency, from about August 2014 to about 2017; purchased and used cocaine on at least one occasion in July 2014, and purchased and used MDA on at least one occasion in July 2014. (Items 2-4)

In a personal subject interview (PSI) conducted by an investigator from the Office of Personnel Management (OPM) in October 2018, Applicant acknowledged frequent smoking of marijuana in college between 2014 and 2017. (Item 3) Explaining in further detail the frequency of his marijuana use and experimenting with other illegal drugs, he told the OPM investigator he smoked marijuana daily (sometimes with friends but mostly alone) to calm himself from being depressed and avert his relying on anti-depressant medications. (Item 3) When asked by the investigator about his future intentions for marijuana use, he expressed uncertainty about any recurrent use he might consider in the future. (Item 3) Based on his OPM interview responses, no clear and reliable inferences can be drawn about Applicant's risks of recurrent involvement with illegal drugs.

### **Applicant's psychological assessments**

Applicant presents with a history of recurrent depression that is traceable to his years in high school. (Items 3-5) While in high school, he met with a therapist and psychiatrist for experienced depression symptoms. (Items 3 and 5) Based on the advice of his therapist, he voluntarily admitted himself to an inpatient mental health center for treatment to address his recurrent suicidal ideation and increased depression. (Items 3 and 5) Following his six-day inpatient hospitalization, he received outpatient treatment for an additional 30 days and was thereafter referred to psychiatrists for follow-up treatment. (Items 3 and 5)

In college (2014-2017), Applicant continued with his mental health treatments. (Items 3 and 5) Records document that Applicant engaged in recurrent self-harm behaviors between 2011 and 2015. (Items 3 and 5) In October 2020, Applicant was referred by DOHA to a psychological evaluator. (Item 5) After meeting with Applicant and reviewing his investigative results and medical records from his 2015 mental health treatment, the retained psychologist concluded that Applicant met the criteria for the following disorders: major depressive disorder (moderate, recurrent); alcohol use disorder (moderate), cannabis use disorder (moderate, in sustained remission); and other hallucinogen use disorder (moderate, in sustained remission). (Item 5)

In her conclusions, the retained psychologist noted that Applicant's diagnosed major mental depressive disorder tends to be a chronic and highly recurrent condition. (Item 5) In her professional opinion, Applicant's cited tendency to self-medicate, coupled with his ambivalence regarding future use of illegal drugs, pointed to a guarded prognosis. In turn, she recommended individual substance abuse treatment and psychiatric intervention for Applicant. (Item 5) Additionally, she recommended that Applicant begin individual therapy with a licensed mental health provider to address "the cognitive and behavioral aspects of his conditions (citing insight, impulse control, coping skills, and negative self-talk)." (Item 5) Wrapping up her evaluation of Applicant, the evaluating psychologist concluded that Applicant's diagnoses posed a risk to his judgment, reliability, and trustworthiness concerning his access to classified information. (Item 5) Whether Applicant ever followed up with individual therapy with a licensed mental health provider is unknown from the developed record.

### **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 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. These 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:* Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability and willingness to comply with laws, rules, and regulations. AG ¶ 24.

### **Psychological Conditions**

*The Concern:* Certain emotional, mental, and personality conditions impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., a clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline and an opinion, including prognosis, should be sought. No negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

### **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 use and purchase of marijuana and his experimenting with other illegal drugs (LSD, Psilocybin Mushrooms, cocaine, and MDA) between 2011 and 2017, and his stated ambivalence about any recurrent illegal drug use in the future. Additional security concerns are raised over Applicant’s diagnosed major depressive disorder, and other hallucinogen use disorder.

#### **Drug involvement and substance misuse concerns**

On the strength of the evidence presented, three disqualifying conditions of the Adjudicative Guidelines (DCs) for drug involvement are apply to Applicant’s situation: DC ¶¶ 25(a), “any substance misuse”; 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia”; and 25(g), “expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.”

Applicant explained that he used marijuana and other drugs for self-medication purposes to address his depression symptoms and avert the need for anti-depressive medications. And, he assured that in the future he will not use illegal drugs in the future

that are incompatible with his employment requirements. Besides marijuana, Applicant identified cocaine, LSD, Psilocybin Mushrooms and other hallucinogens (inclusive of LSD) that he experimented with. as his drugs of choice. Encouraged by his evaluating mental health professional to seek treatment for his substance use disorder, Applicant has not in this record provided any documentary proof of seeking any professional help for his diagnosed cannabis use disorder. Nor did he provide any details of what kind of medical condition or specific medical condition he has or might have that could warrant any prescribed medicinal use of marijuana.

Federal law does not permit marijuana use, or any other illegal drug for any purpose (inclusive of medicinal purposes). See 21 U.S.C. §§ 802, 812, and 813. Adherence to Federal laws prohibiting the purchase and use of illegal drugs is mandated for all federal employees and defense contractors having access to classified information.

In addressing the legalization of marijuana in some states, the Department of Justice (DoJ) and Director of National Intelligence (DNI) issued guidance in 2014 on the impact of state marijuana laws upon the Government and its laws and programs. In a memo issued by the DNI in October 2014 addressing security-related concerns associated with the legalization of marijuana in certain states, the DNI confirmed that changes in state laws and the laws of the District of Columbia pertaining to marijuana use did not affect or impact the AGs covering drug involvement. Federal law has and continues to control any marijuana use and purchases initiated by Applicant, both historically and for any use he intends in the future for claimed medicinal purposes. See Federal Guidelines (Oct. 25, 2014).

Under the terms and conditions of the Controlled Substance Act (CSA ), 21 U.S.C. ¶ 801 *et seq.*), Congress generally prohibited the cultivation, distribution, and possession of marijuana. (Item 10) It established significant penalties for these crimes. (21 U.S.C. ¶ 841 *et seq.*) These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime. DoD guidelines implementing the federal legal ban covering marijuana use and possession require federal prosecutors to weigh all relevant considerations when making prosecution decisions. (Item 10)

Based on Applicant's drug use history and past ambiguous statements about his likelihood of ever returning to illegal drug use in the future, mitigation is not available at this time. More time is needed for Applicant to seek advice and counseling on his recurrent use of marijuana and other illegal drugs in the past and obtain favorable prognoses on the risks of recurrence before his past purchase and use of marijuana and other illegal drugs he experimented with before he can be credited with any meaningful mitigation.

### **Psychological conditions concerns**

Besides incorporating allegations of drug involvement and substance abuse from Guideline H, the SOR alleges that Applicant has a long history of mental health issues

with depression and was diagnosed in 2020 by a licensed clinical psychologist with major depressive disorder (moderate, recurrent). Based on the DOHA evaluator's concluded diagnosis and guarded prognosis of Applicant, mental health issues remain active and pose continuing risks of Applicant's posing serious problems with his judgment, reliability, and/or trustworthiness

Applicable to Applicant's situation is one disqualifying condition under Guideline I. DC ¶ 27(b), "an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness"; 27(c), voluntary or involuntary hospitalization"; and 27(d), "failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions" applies.

Mitigation is not available to Applicant at this time. Without evidence of Applicant's following up with recommended mental health counseling, obtaining a updated favorable prognosis from a duly qualified mental health professional, or otherwise demonstrating that his diagnosed depression disorder was only temporary and no longer manifests any indications of emotional instability, favorable inferences of mitigation cannot be drawn at this time. While there is no evidence of specific failures of Applicant to follow prescribed treatment recommendations, his lack of any documented follow-up counseling and treatment from a duly authorized mental health provider is troubling and weakens his post-FORM claims of improvement in his personal and professional life and overall mental health.

### **Whole-person assessment**

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his history of marijuana involvement and experimentation with other drugs over a considerable period of time (six years) for calming and self-medicating purposes is compatible with minimum DoD requirements for holding a security clearance. Without any demonstrated compliance with federal law, or with the recommendations of a duly licensed mental health professional, showing that his marijuana involvement and diagnosed psychological conditions are otherwise compatible with DoD requirements for holding a security clearance, Applicant is unable to mitigate the Government's well-documented security concerns.

While Applicant is entitled to credit for his civilian contributions to the defense industry, his efforts are not enough at this time to overcome his lengthy history of marijuana use and purchases, experimentation with other illegal drugs, and diagnosed depression disorder that together create continuing risks of lapses in judgment, reliability, and trustworthiness. .

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement and



psychological conditions security concerns are not mitigated. Eligibility for access to classified information is denied.

### **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:

GUIDELINE H (MARIJUANA INVOLVEMENT):      AGAINST APPLICANT

    Subparagraphs 1a-1e:                              Against Applicant

GUIDELINE I (PSYCHOLOGICAL CONDITIONS):      AGAINST APPLICANT

    Subparagraph 2.a:                                  Against Applicant

### **Conclusion**

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

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Roger C. Wesley  
Administrative Judge