



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 22-02104
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel  
 For Applicant: *Pro se*  
 07/06/2023

**Decision**

MARINE, Gina L., Administrative Judge:

This case involves 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 April 11, 2022. On November 14, 2022, the Department of Defense Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The CAF acted under Executive Order (EO) 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on November 15, 2022, and requested a decision based on the written record in lieu of a hearing. On December 15, 2022, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 6. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the

FORM on February 9, 2023, but did not respond to the FORM or object to the Government's evidence. The case was assigned to me on April 28, 2023.

### **Evidentiary Matters**

Items 1 through 4 contain the pleadings in the case. Items 5 and 6 are admitted into evidence. Although Item 6 was not authenticated as required by Directive ¶ E3.1.20, I conclude that Applicant waived any objection to Item 6. The Government included in the FORM a prominent notice advising Applicant of his right to object to the admissibility of Item 6 on the ground that it was not authenticated. Applicant was also notified that if he did not raise an objection to Item 6 in his response to the FORM, or if he did not respond to the FORM, he could be considered to have waived any such objection, and that Item 6 could be considered as evidence in his case.

### **Findings of Fact**

Applicant, age 31, is unmarried without children. He has resided with a cohabitant since 2014. He earned an associate degree in February 2020 from a community college he began attending in August 2018. He attended another college from August 2020 through at least April 2022, without earning a degree. He worked part-time for two different grocers from July 2011 through at least April 2022. This is Applicant's first application for a security clearance. His employment status with the defense contractor sponsoring his SCA is not indicated in the record. (Item 5)

Applicant smoked marijuana from about August 2009 (age 17) through November 2019 (age 27), which he described as his "high school and college" years. From August 2009 through 2015, he smoked marijuana three to five times a week. After his father passed away in 2015, he reduced the frequency of his marijuana use to once every six months because smoking marijuana caused him to be depressed and sad. He purchased marijuana for his personal use: in high school, from a friend; and in college, from either a neighbor or a friend. He usually smoked marijuana while with other people: in high school, with his brother and three unnamed friends; and in college, with his roommate. (Items 5, 6)

Applicant used Adderall without a prescription from September 2015 (age 23) through November 2019 (age 27), about every three months. On each occasion that he used Adderall, he ingested one or two pills. He maintained that he used Adderall to help him study and focus, in preparation for his college exams. He purchased at least one of the Adderall pills he used from either a friend or another unnamed person. (Items 5, 6)

Applicant used lysergic acid diethylamide (LSD) two times, in November 2019 (age 27) and March 2021 (age 28). On each occasion that he used LSD, he ingested one-third of a tab, which had been provided to him by a friend. He maintained that he used LSD to enhance his experience at music festivals he attended with friends. He suffered adverse effects following his use of LSD the second time and has not used it since. (Items 5, 6)

Applicant used cocaine one time in December 2021. The cocaine was provided to him by an individual he met while on a camping trip with friends. He rolled up a dollar bill and snorted one line of cocaine at two separate times during the same camping trip. The following day, he suffered adverse effects due to his cocaine use. (Items 5, 6)

In his April 2022 SCA, Applicant asserted that he had no intent to use marijuana, Adderall, LSD, or cocaine, in the future. With regard to why he did not intend to continue his marijuana use, he stated, "I am extremely driven and weed doesn't help me to be the person I want to be." As to why he did not intend to continue his LSD use, he stated, "I dont [sic] intend to use it anymore because it wasn't a positive experience and I'm past that part in [sic] my life." Concerning why he did not intend to continue his cocaine use, he stated, "[m]oving on with my career and having a family in the future." (Item 5).

During his June 2022 security clearance interview, Applicant explained that he initially smoked marijuana to be accepted and hang out with the cool kids. He described his college career as longer than it should have been due to a lack of motivation and self-confidence he attributed to his marijuana use. He regretted using cocaine because he knew that he should not have used it and attributed his one-time use to being absorbed into his environment. He professed that he had transitioned out of his party phase and no longer needed to use drugs to hang out with his friends or feel included. He averred that he no longer needed to use Adderall because he had become more confident in his academic ability. (Item 6)

During his June 2022 security clearance interview, Applicant asserted that he no longer associated with drug users. He maintained that his friends have either graduated or are not willing to jeopardize their careers by using drugs. Of the three references Applicant listed on his SCA, two were friends with whom he had smoked marijuana. He maintained that neither friend smoked marijuana anymore. He was not sure whether his brother still smoked marijuana, as his brother did not live close by. (Items 5, 6)

In his November 2022 Answer, Applicant reiterated his commitment to abstinence from marijuana, Adderall, LSD, cocaine, and any other controlled substances. He stated, "I understand the illegal use of controlled substances greatly damages my future career and I have already dedicated myself to changing this behavior . . ." He maintained that he has become "more career and family oriented, has dedicated himself to living a "more healthy and meaningful life." He has distanced himself from those with whom he used Adderall, LSD, and cocaine, and changed his environment by moving away from his hometown and college town.

### **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." (*Egan* 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 AG. 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. (*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. (ISCR Case No. 92-1106 at 3 (App. Bd. Oct. 7, 1993)). 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. (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; AG ¶ 2(b)).

## 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.

The record evidence establishes the following disqualifying conditions under this guideline:

AG ¶ 25(a) any substance misuse (see above definition); and

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

I, *sua sponte*, took administrative notice that, in December 2021, the Office of the Director of National Intelligence (DNI) issued updated guidance reaffirming that federal law remains unchanged with respect to marijuana use, possession, production and distribution; and that individuals who hold security clearances or occupy a sensitive position within the federal government are currently prohibited by law from using controlled substances, such as marijuana, on or off-duty. The guidance also made clear that prior recreational marijuana use by an individual applying for a security clearance or national security position might be relevant to adjudications, but not determinative. The guidance instructed federal agencies to adjudicate each potential applicant through a "whole-person concept" by evaluating multiple variables in an individual's life to determine whether past marijuana use raises a security concern and whether that concern has been mitigated.

Having considered all the factors set forth in AG ¶ 26 that could mitigate the concern under this guideline, I find the following warrant further discussion:

(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

(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.

Applicant's regular marijuana use spanned a period of ten years, well into adulthood. His Adderall misuse occurred for an extended period of four years. While infrequent, his use of LSD and cocaine raises further questions about his judgment and willingness to comply with rules. I considered that Applicant stopped using drugs prior to applying for a security clearance and changed his environment. However sincere his professed commitment to abstinence may be, he has not established a sufficient pattern of abstinence in light of the recency and circumstances of his drug use. He did not provide the signed statement of intent described in AG ¶ 26(b)(3). I have doubts about his reliability, trustworthiness, and judgment. Neither AG ¶¶ 26(a) nor 26(b) are established. Accordingly, I conclude that Applicant failed to meet his burden to mitigate the Guideline H concerns.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, 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 Guideline H in my whole-person analysis, and considered the factors in AG ¶ 2(d) and the DNI's December 2021 guidance. Because Applicant elected a decision on the written record in lieu of a hearing, I did not have the opportunity to ask him questions about his conduct, or to assess his credibility. After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the Guideline H security concerns. Accordingly, Applicant has not carried his

burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

Formal findings 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.d:           Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine  
Administrative Judge