



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 21-02928

**Appearances**

For Government: Dan O'Reilly, Esq., Department Counsel  
For Applicant: Carl Marrone, Esq.

09/05/2023

**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 June 1, 2022, 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 on June 28, 2022, and requested a hearing. The case was assigned to me on April 6, 2023. A hearing was scheduled for May 15, 2023, and heard on the date as scheduled. At the hearing, the Government's case consisted of eight exhibits (GEs 1-8). Applicant relied on three witnesses (including himself) and eight exhibits (AEs A-H). The transcript (Tr.) was received on May 25, 2023.

### **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 recap of his marijuana history. For good cause shown, he was granted 14 days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant supplemented the record with a recap of his marijuana activity. Applicant's submission was admitted without objection as Applicant's AE I.

### **Summary of Pleadings**

Under Guideline H, Applicant allegedly used marijuana over a period of years. More specifically, he allegedly (a) used marijuana with varying frequency from about September 2018 to about September 2020 and (b) used and purchased marijuana from about September 2008 to about October 2009. And, he allegedly (c) used marijuana with varying frequency from about September 2018 to about September 2020, while granted a security clearance and (d) used and purchased marijuana with varying frequency, from about September 2008 to about October 2009, while granted a security clearance; and (e) used and purchased marijuana with varying frequency from about January 1996 to about October 2020.

In Applicant's response to the SOR, Applicant admitted all of the allegations pertaining to prior marijuana use and purchases with explanations. He claimed the use of the term "with varying frequency" in the SOR, because he only used marijuana on three occasions between September 2018 and September 2020: twice in 2018 and once in 2020 while on camping trips with his cousin in the mountains of a neighboring state. He also claimed his use of marijuana in 2018-2020 was extenuated by the stressful circumstances he was experiencing with his work. Addressing his 2008-2009 use of marijuana, Applicant claimed he possessed a small amount of marijuana during the 2008-2009 time-frame and used the drug with his cousin on a few occasions. He claimed to have used the marijuana to relieve his stress and anxiety from an ongoing divorce without considering the consequences of his actions. He further claimed that he no longer possesses or controls any drugs or paraphernalia. And, he claimed that peer pressure played a major role in his use of marijuana in college.

### **Findings of Fact**

Applicant is a 46-year-old employee of 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 married in April 2005 and divorced in March 2009. (GEs 1-3; Tr. 34) He remarried in November 2012 and has three children from this marriage (ages eight, six and six). (GEs 1-3; Tr. 86). Applicant earned a bachelor's degree in electrical engineering in December 2000. (GEs 1-3; Tr. 29) He reported no military service.

Since January 2001, Applicant has been employed by his current defense contractor as an electrical engineer. (GEs 1-3) Previously, he worked for another employer in a technical support position. He has held a security clearance since June 2003. (GEs 1-3)

## **Applicant's drug history**

Applicant was introduced to marijuana in college. (GE 8; Tr. 30) He estimates to have used marijuana intermittently between 1997 and 2001. His use of marijuana typically made him "feel happy and hungry." (GE 8; Tr. 31-32) Concerned about the potential for testing positive after accepting a position with his current employer, Applicant ceased using marijuana. (GE 8)

While on a camping trip in another state in May 1997 with college friends, Applicant's friends supplied him marijuana, which he used with them on the trip. (GE 8) Typically, he paid approximately \$15.00 for "one hit," which he placed in his mouth. (GE 8) When interviewed by an investigator from the Office of Personnel Management (OPM) in May 2003, he told the investigator that he no longer associates with anyone who uses drugs and has no "future intentions of using any illegal substance." (GE 8) For reasons, he cited his concerns over succumbing to irresponsible behavior that could expose him to risks of losing his job. (GE 8)

Between 2001 and 2008, Applicant avoided illegal drugs and persons who used them (inclusive of marijuana) altogether. (GE 7) In September 2008, Applicant resumed his use of marijuana, in this case on a camping trip with his cousin in a neighboring state that at the time legalized the use of the substance for medicinal purposes. (GE 7; Tr. 33-34) Going through a divorce at the time, Applicant was burdened with stress and anxiety and did not consider the consequences of his actions. (GEs 2-3 and 7) He retained a small amount of marijuana for a little over a year and "smoked it 1-2 times per month during that duration." (GE 2)

Thereafter, Applicant abstained from marijuana use for over 10 years before resuming his use of the drug in September 2018. (GE 6; Tr. 40-41) While under work-related stress and anxiety, Applicant resumed his use of marijuana with his same cousin between 2018 and 2020: twice in 2018 and once in 2020 (GE 6; Tr. 41-42) Applicant has never been physically addicted to marijuana and is fully familiar with federal laws that ban the use of marijuana. With a better understanding of symptoms of stress and anxiety through his consultations with his engaged therapist, he assured that he is currently better situated to deal with these symptoms with developed coping mechanisms and avoid marijuana when navigating future stress situations. (GE 6; Tr.

53-55) He fully understands and appreciates the mistakes he made in turning to marijuana to address his past stress-related issues while holding a security clearance and the potential consequences he faces should he slip again in the future. (AEs A and E; Tr. 57-60)

Applicant's submissions include a signed, sworn statement, pledging to remain free from all drugs, including marijuana, and refrain from any and all substance abuse. (AE A) In his statement, he fully acknowledged that any future involvement with drugs or misuse of the same will be grounds for revocation of his security clearance and any national security eligibility. (AE A; Tr. 83)

Applicant's 2023 pledge to refrain from illegal drug use (inclusive of marijuana), while encouraging, is not the first time he has pledged to refrain from possessing and using illegal drugs (both explicitly and implicitly). He made a similar pledge to avoid any future use of marijuana in an OPM interview in 2003. (GE 8)

Further, in an e-QIP Applicant completed in March 2010, he acknowledged his purchase and use of marijuana one to two times a month between 2008 and 2009 during a difficult time for him and assured he no longer possessed or controlled illegal drugs. (GE 3) In a follow-up interview with an OPM investigator in May 2010, he acknowledged again his purchase and use of marijuana in 2008-2009, and assured he was no longer in possession or control of illegal drugs and stopped "cold turkey" using illegal drugs in October 2009. (GE 7)

In his own statement, Applicant traced his growth in a rural farming community to his college schooling, and to his post-college acceptance of a position with his current employer. (AE E) He described his current marriage and separation and joint commitments to their "kids' lives and activities," while looking for ways to reconcile their relationship. (AE E) Applicant detailed the active hobbies of his children and himself. Historically, he has enjoyed many hobbies (inclusive of computers and technology, woodworking, gardening, cooking, camping/outdoors, hunting, auto repair and restoration, and motorcycles). (AE E) He cited to a strong family military heritage and his own unique skills and capabilities that have enabled him to design and build computing and processing systems for future military fighting platforms. (AE E) For all of his contributions to the U.S. fighting force, he remains "very proud." (AE E)

With his wealth of experience in the defense industry and more recent 2023 pledge to avoid all illegal drugs (inclusive of marijuana) in the future, Applicant is entitled to considerable credit. His recent pledge of sustained abstinence is encouraging and worthy of acceptance as a sincere reflection of his current thinking. Because of his failures in keeping similar pledges in the past, assigning weight to his latest pledge of abstinence will require adjusting to account for his failed prior pledges of future abstinence. Based on Applicant's historical accounts of his marijuana use and repeated failed assurances to abstain, additional corroborating proofs (inclusive of an assessment from a licensed substance abuse counselor) are needed to fully validate his most recent pledge of sustained future abstinence.

## **Endorsements and performance evaluations**

Although currently separated from his wife, he and his spouse are working seriously to reconcile. His spouse is fully supportive of his continuing efforts to manage his stresses and anxieties without resorting to marijuana. (Tr. 86) Applicant's spouse characterized him as hilarious and genuine, and a person who is both brilliant and kind to people. (Tr. 86-87)

Applicant's wife herself held a clearance between 2002 and 2016, and again in November 2022. (AE E; Tr. 87) She credited Applicant with being active in his community with food donations and Little League coaching. (Tr. 88) And, she assured that she has never smelled marijuana on Applicant before or harbored suspicions of his "getting high" with his cousin. (Tr. 90)

Applicant is highly regarded by his senior managers. (AEs G-H; Tr. 93-97, 104-106) Although, none of these references professed to have any knowledge of Applicant's past use of marijuana. Applicant is credited with superior contributions to his employer's defense missions for the rated years of 2016 through 2022. (AEs B and F)

## **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 v. United States*, 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 recurrent use and purchases of marijuana over a considerable number of years (2008-2020) after he was granted a security clearance. Applicant’s recurrent involvement with illegal drugs invite concerns over whether his actions reflect pattern marijuana use that are incompatible with the judgment, reliability, and trustworthiness requirements for gaining access to classified information.

Applicant’s admissions to using marijuana raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, three disqualifying conditions (DCs) of the AGs for drug involvement 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 illegal drugs or drug paraphernalia”; and 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

To his credit, Applicant pledged anew to abandoning all involvement with marijuana. And, for almost three years, he has remained abstinent from illegal drugs (inclusive of marijuana). Currently, he 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. However, his most recent pledge to avoid illegal drugs is not the first time he has offered assurances of his intentions to avoid involvement in illegal

drugs (inclusive of marijuana) in the future. On three separate occasions, he made similar pledges, only to return to marijuana use to deal with recurrent issues of stress and anxiety.

Keeping promises is a fundament of the trust relationship an applicant enters into with the Government once he is granted access to classified information. See *Snepp v. United States*, 444 U.S. 507, 510-511n.6 (1980) Trust relationships involve reciprocal promises and commitments between the parties. Promises by the Government to grant access to classified information require reciprocal promises and commitments by the approved applicant to adhere to federal laws, regulations, and policy guidelines imposed on the applicant's holding a security clearance. Put differently, promises made by an applicant in a trust relationship with the Government are promises that need to be kept for the duration of his trust relationship. By failing to keep his promises and commitments to avoid activities involving illegal drugs, Applicant breached his trust agreement with the Government in a material way

To be sure, Applicant has exhibited candor throughout the investigation process and warrants credit with being upfront with Government investigators. Still, his material breaches of the promises he previously made to avoid all future involvement with illegal drugs require accountability and adjustments in the time lines potentially available to applicants without security clearances who hypothetically seek mitigation of prior instances of illegal drug use. With the persuasive burden of proof firmly fixed on Applicant to dispel all doubts about any risks of recurrence, Applicant's evidentiary burden is considerable. And, final decisions require definitive assessments without any allowances for conditional decisions. *Egan* teaches that where doubts exist about an applicant's recurrence risks when considered contextually with unfulfilled past abstention promises, doubts must be resolved in the Government's favor. See *Egan v. the Department of the Navy, supra*, at 531.

What might under other circumstances warrant successful mitigation with almost three years of sustained abstinence will require additional years of seasoning on Applicant's part to restore the trust levels required to access classified information. So, while Applicant is entitled to credit for his exhibited candor about his past involvement with marijuana in his e-QIPs and personal subject interviews, more time is needed here to re-establish the trust levels required for continued eligibility to hold a security clearance.

Overall, while Applicant has shown marked improvement in his judgment and maturity level in the almost three years he has avoided marijuana use, it is too soon to credit him with full mitigation of his past involvement with illegal drugs (marijuana) while holding a security clearance. Without additional proven time in sustained abstinence, application of 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 . . . , (2) changing or avoiding the environment where drugs were used . . . ,” is very limited.

### **Whole-person assessment**

From a whole-person perspective, Applicant has not established enough 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. Because of his past unfilled promises to refrain from future illegal drugs (inclusive of marijuana), more time in sustained abstinence is needed to restore the trust levels required for continued eligibility to hold a security clearance.

Considering the record as a whole at this time, inclusive of the credits Applicant is entitled to in recognition of his contributions to the defense industry, there is insufficient probative evidence of sustainable mitigation in the record to make safe predictable judgments about Applicant’s ability to avoid illegal drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant’s recurrent drug activities over a 13-year period while holding a security clearance, Applicant has not mitigated security concerns with respect to the allegations covered by SOR ¶¶1.a through 1.e.

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 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 (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	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