



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



In the matter of: )  
)  
) ISCR Case No. 23-01148  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tara R. Karoian, Esq., Department Counsel  
For Applicant: *Pro se*

12/28/2023

**Decision**

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guideline H (drug involvement and substance misuse) are mitigated. Eligibility for access to classified information is granted.

**Statement of the Case**

On March 1, 2022, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 7, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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 DCSA CAS 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

June 14, 2023, Applicant provided a response to the SOR and requested a hearing. (HE 3) On June 28, 2023, Department Counsel was ready to proceed.

On July 11, 2023, the case was assigned to me. On July 25, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for September 19, 2023. (HE 1) The hearing was held as rescheduled.

Department Counsel offered three exhibits into evidence, and Applicant did not offer any exhibits into evidence. (Transcript (Tr.) 11, 19-22; GE 1-GE 3) Applicant objected to GE 3 because he believed several parts of the Office of Personnel Management (OPM) personal subject interview (PSI) contained errors. (Tr. 21, 44-45) I sustained his objection to the OPM PSI. (Tr. 21) Applicant did not adopt or authenticate the OPM PSI before the hearing. On September 28, 2023, DOHA received a transcript of the hearing. Applicant provided five exhibits after his hearing, which were admitted without objection (AE A-AE E). The record closed on October 19, 2023. (Tr. 44-52)

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 through 1.f. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 35-year-old software engineer who has worked for the same defense contractor for 11 years. (Tr. 7, 8, 24) In 2006, he graduated from high school, and in 2013, he was awarded a bachelor of science degree in mechanical engineering. (Tr. 7; AE C) He expects to receive a master's degree in business administration (MBA) in 2024. (Tr. 7-8; AE C) He has not married, and he does not have any children. (Tr. 8) He has never served in the military. (Tr. 8)

In 2021, Applicant worked on the commercial side of the defense contractor's business. (Tr. 29) He was not working on defense projects. (Tr. 29) In 2022, he shifted to software and working with defense matters. (Tr. 48) He believed his company policy was to comply with local law concerning drug use, and in his state marijuana use is legal. (Tr. 29-30) Use of illegal drugs at work is prohibited. (Tr. 30)

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

On September 6, 2022, Applicant responded to DOHA interrogatories and provided the recency and frequency in which he used various illegal drugs. (GE 2 at 2) He agreed at his hearing that those answers were correct. (Tr. 25) The information about his recency and frequency of his use of illegal drugs is detailed in SOR ¶¶ 1.a through 1.f, *infra*.

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about August 2002 to about July 2021. He used marijuana once or twice a year from 2016 to July 2021. (Tr. 25; GE 1 at 49) He smoked marijuana once and ate CBD edibles or gummies about six times in 2021. (Tr. 26, 28, 47) He was unsure if the CBD edibles contained tetrahydrocannabinol (THC). (Tr. 26) He ate Cannabidiol (CBD) edibles on several weekends because he had pain in his back, and the CBD edibles helped him sleep. (Tr. 27, 47) He has improved his office equipment and received therapy to help with his back pain. (Tr. 36) His most recent use of an illegal drug involved his consumption of CBD in July 2021 or smoking a marijuana joint earlier in 2021.

SOR ¶ 1.b alleges Applicant used hallucinogenic mushrooms with varying frequency from about August 2014 to about July 2016. He said he used mushrooms three times while hiking with others in the woods. (GE 1 at 50) The most recent use of mushrooms was in July 2016 while with friends camping. (*Id.*)

SOR ¶ 1.c alleges Applicant used cocaine with varying frequency from about May 2015 to about July 2018. He used cocaine a total of three times: once in 2015; once in 2016; and once in 2018. (Tr. 31-32) When he used cocaine the first two times, he ingested four lines or bumps. (Tr. 31) The third time he ingested one line of cocaine at a friend's bachelor's party in 2018. (Tr. 30-31)

SOR ¶ 1.d alleges Applicant used 3,4-Methylenedioxymethamphetamine (MDMA) or ecstasy on at least one occasion on approximately May 2016. He received a dose of ecstasy from a friend at a music concert in May 2016, and he used the ecstasy. (GE 1 at 51; GE 2 at 2)

SOR ¶ 1.e alleges Applicant misused the prescription medication, Xanax, which was not prescribed to him, on at least one occasion in approximately October 2015. Applicant said a friend gave him one half of a Xanax pill when he was in a bar, and he used the Xanax in October 2015. (GE 1 at 52; GE 2 at 2)

SOR ¶ 1.f alleges Applicant used LSD on at least one occasion in approximately May 2016. He said he used LSD at a music concert in May 2016. (GE 1 at 50; GE 2 at 2)

Applicant voluntarily and truthfully reported his use of illegal drugs. (Tr. 18) He regretted his poor decisions to use illegal drugs. (Tr. 17, 49) At the time he was experimenting with illegal drugs, he did not realize or appreciate the problematic nature of this illegal drug use. (Tr. 17) Since 2021, he consumes less than one alcoholic beverage per month. (Tr. 18)

Applicant ended his illegal drug use because he is more mature. (Tr. 34) He is diligently trying to improve himself. (Tr. 49) He ended his experimentation with illegal drugs, and he does not attend parties and concerts where drugs are used. (Tr. 36) He has a good relationship with his girlfriend, and he wants to live a healthy lifestyle. (Tr. 34) He has ended his associations with his drug-using associates. (Tr. 17, 34-35) He has no intention of using illegal drugs in the future. (Tr. 19)

## Character Evidence

Applicant's supervisor and a friend provided character reference statements. (AE B) Applicant was an outstanding athlete in college. He was on a team which was the best in the country at that time. He has integrity and professionalism.

Applicant has outstanding performance evaluations, and he received numerous monetary and recognition awards. (AE D; AE E) He contributes to his company.

## 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 [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**

### **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.

AG ¶ 25 provides 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, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” The record establishes AG ¶¶ 25(a) and 25(c). Additional discussion of the disqualifying conditions is 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;

(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).

Applicant admitted that he possessed and used marijuana, cocaine, LSD, hallucinogenic mushrooms, MDMA or ecstasy, and the prescription medication, Xanax, which was not prescribed to him. The drugs he used are listed on Schedules I through IV of the Controlled Substances Act. See 21 U.S.C. § 812(c); Drug Enforcement Administration listing at <https://www.dea.gov/drug-information/drug-scheduling>.

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[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.

*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* (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

Applicant's decisions to repeatedly possess and use illegal drugs are an indication he lacks the qualities expected of those with access to national secrets. However, he elected to end his misuse of drugs before he completed his SCA, and he disclosed his drug involvement. His misuse of drugs was not discovered through a polygraph test, investigative efforts, or a urinalysis test.

Applicant's involvement with illegal drugs is not recent, and I am convinced it "happened under such circumstances that it is unlikely to recur." AG ¶ 26(a). His involvement with illegal drugs does not "cast doubt on [his] current reliability, trustworthiness, [and] good judgment." (*Id.*) His most recent use of an illegal drug involved his consumption of CBD in July 2021, and he has established a sufficient pattern of abstention from illegal drugs. Guideline H security concerns are mitigated.

### **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 35-year-old software engineer who has worked for the same defense contractor for 11 years. In 2006, he graduated from high school, and in 2013, he was awarded a bachelor of science degree in mechanical engineering. He expects to receive an MBA in 2024. In 2022, he shifted to software and working with defense matters. He acknowledged that his change in employment in 2022 necessitates his compliance with defense rules prohibiting use of illegal drugs.

Applicant’s supervisor and a friend provided character reference statements supporting his access to classified information. Applicant has integrity and demonstrates professionalism. He has outstanding performance evaluations, and he received numerous monetary and recognition awards. He contributes to the success of his company.

Applicant’s most recent consumption of an illegal drug was his consumption of a CBD gummy in July 2021, and smoking marijuana earlier that year. At that time, marijuana use was authorized under state law. He consumed the CBD gummy to help with back pain. He completed an SCA on March 1, 2022. He volunteered the information about his abuse of six different illegal drugs (includes use of Xanax without a prescription). He credibly promised not to use illegal drugs in the future.

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 mitigated 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:	FOR APPLICANT
Subparagraphs 1.a through 1.f:	For Applicant



## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

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Mark Harvey  
Administrative Judge