



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



In the matter of: )  
)  
) ISCR Case No. 23-00754  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

02/20/2024

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns under Guideline D (sexual behavior), but he did not mitigate the security concerns under Guidelines E (personal conduct) and H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

**Statement of the Case**

On June 5, 2023, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D, E, and H. Applicant responded to the SOR on June 12, 2023, and requested a hearing before an administrative judge. The case was assigned to me on November 28, 2023.

The hearing convened as scheduled on January 19, 2024. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified and called a witness, but he did not submit any documentary evidence.

## Findings of Fact

Applicant is a 61-year-old employee of a defense contractor. He has worked for his current employer since 2004. He has held a security clearance since about 2004 or 2005. He served in the U.S. military from 1979 until he was honorably discharged in 1981. He attended college for a period without earning a degree. He has been married for more than 30 years. He has four adult children and two grandchildren. (Transcript (Tr.) at 15-18; GE 1, 2)

Applicant was sexually assaulted as a child, and he grew up in an abusive home. He has been diagnosed with complex post-traumatic stress disorder (PTSD) from his childhood trauma. He managed his anxiety over his traumatic memories for years, but the anxiety increased as he got older. In about September 2019, he became involved in a series of extramarital sexual encounters (“hook-ups”) in which he explored bondage, discipline, sadism, and masochism (BDSM) with other consenting adults. He did not engage in extreme BDSM, and no one was ever injured. He described it as a “sex addiction,” and he estimated that he had about 150 partners. He met the individuals through online forums. Some of the individuals knew he worked for a federal contractor, but he did not discuss his work. He believes his sexual activities were related to his childhood trauma. (Tr. at 18-19, 32-35; Applicant’s response to SOR; GE 2)

Applicant used marijuana as a youth, and then went decades without using marijuana. He resumed his use in about September 2019, about the same time he became involved with BDSM. His marijuana use was also connected to his childhood trauma. A friend who was a Vietnam veteran told him that marijuana helped with his PTSD symptoms. Applicant used marijuana in various forms almost every night. He usually used it alone, but he also used it occasionally during his extramarital encounters. At the time, medical marijuana did not violate state law, but recreational marijuana had not yet become permitted under state law. Applicant knew that marijuana use violated federal law, was against his employer’s drug-free workplace policy, and was inconsistent with his responsibilities as a clearance holder. He held a security clearance at the time, but he did not have access to classified information. He initially bought marijuana from individuals who received it from medical marijuana dispensaries. After his state law changed to permit recreational marijuana use, he bought the marijuana from dispensaries himself. (Tr. at 12, 18-27, 32, 42; Applicant’s response to SOR; GE 1-3)

Applicant was stopped by the police for driving through a red light in late May 2022. The police officer noted what appeared to be marijuana and paraphernalia in the car. After a sobriety test, the police drew blood to be tested, and charged him with driving under the influence (DUI) of liquor, drugs, or vapors. Applicant stated that he had nothing to drink. He used marijuana the night before but nothing the day he was driving. He stated that the blood test detected no alcohol, and it was not tested for THC. The charge was dismissed. (Tr. at 12, 24-25; Applicant’s response to SOR; GE 1-3)

Applicant reported his DUI charge to his employer about two days after the incident. The description he provided to his facility security officer (FSO) is consistent

with his testimony and is accepted as fact. (Tr. at 12, 24-25; GE 3) The FSO reported the incident to the DoD in an incident report that contained the following narrative:

[Applicant] stated that he realizes that he will have to change his approach to treatment for his PTSD as long as cannabis is not federally legal. He has been through two years of therapy and is now much improved. [Applicant] stated that he went to a meeting Friday night and got a sponsor and plan[s] to do a treatment intensive [sic] as soon as he can arrange it. Employee will report future status. (GE 3)

Applicant continued to use marijuana for about two weeks after he reported himself. He stated that it was difficult to stop immediately. He has not used any illegal drugs since he last used marijuana in June 2022. He informed his wife about his marijuana use, his extramarital activities, and his involvement in BDSM shortly after his DUI arrest. He also informed people at work, his church, and his family. He has not been involved in any extramarital activities since he told his wife. (Tr. at 13-14, 24-26, 34-41; Applicant's response to SOR: GE 1, 2)

Applicant attended Alcoholics Anonymous (AA), Narcotics Anonymous (NA), and Sex Addicts Anonymous (SAA) meetings. He and his wife receive therapy from a certified sex addiction therapist. Applicant is actively involved with an online community of men who are in recovery; he attends in-person meetings once a week; and he sees a counselor once a week. He embraced his faith, and he has turned to meditation and prayer instead of sex and marijuana. He no longer associates with any of the individuals with whom he used illegal drugs. (Tr. at 13-14, 27-31, 41; Applicant's response to SOR: GE 1, 2)

Applicant submitted a Questionnaire for National Security Positions (SF-86) in August 2022. He reported his marijuana use and his DUI arrest. He fully discussed his marijuana use and his extramarital activities during his background interview in February 2023. (GE 1, 2)

Applicant called a witness who has worked with him for about eight to nine years. He described Applicant as "a very honest guy to a fault actually." Applicant informed him and others at work about his issues. He stated that Applicant may be many things, but a "liar is not one of them." (Tr. at 42-47)

## **Policies**

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline H, Drug Involvement and Substance Misuse**

The security concern for drug involvement and substance misuse 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 guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant purchased, possessed, and used marijuana from about September 2019 to June 2022. AG ¶¶ 25(a) and 25(c) are applicable.

SOR ¶ 1.c alleges Applicant's marijuana use "while granted access to classified information." He held a security clearance when he used marijuana, but he did not have access to classified information. AG ¶ 25(f) is not applicable. SOR ¶ 1.c is concluded for Applicant.

SOR ¶ 1.d alleges that Applicant was arrested in May 2022 and charged with driving under the influence of liquor, drugs, or vapors. It also alleges that the charge was dismissed. Applicant had marijuana and paraphernalia in the car. He stated that he had nothing to drink. He used marijuana the night before, but nothing the day he was driving. The SOR did not allege Applicant's possession of marijuana and paraphernalia under this allegation. Rather, it alleges that he drove while under the influence of marijuana. I am unable to find by substantial evidence that he did so. SOR ¶ 1.d is concluded for Applicant.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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.

On October 25, 2014, the Director of National Intelligence (the Security Executive Agent (SecEA)) issued DNI Memorandum ES 2014-00674, "*Adherence to Federal Laws Prohibiting Marijuana Use,*" which 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.

On December 21, 2021, the 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.

Applicant was granted a security clearance in about 2004 or 2005. He knew that marijuana use violated federal law, was against his employer's drug-free workplace policy, and was inconsistent with his responsibilities as a clearance holder. He did not report his marijuana use until after he was arrested for DUI during which the police officer noted what appeared to be marijuana and paraphernalia in the car.

Applicant credibly testified that he has not used any illegal drugs since he last used marijuana in June 2022. He attended AA, NA, and SA meetings. He is actively involved with an online community of men who are in recovery; he attends in-person meetings once a week; and he sees a counselor once a week. He embraced his faith, and he has turned to meditation and prayer instead of sex and marijuana. He no longer associates with any of the individuals with whom he used illegal drugs.

Applicant's testimony that he does not intend to use illegal drugs in the future was sincere and credible. However, it does not mitigate the extremely poor judgment he displayed when he used marijuana on an almost daily basis for several years while holding a security clearance. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. None of the mitigating conditions are sufficient to mitigate Applicant's illegal marijuana use while holding a security clearance.

#### **Guideline D, Sexual Behavior**

The security concern for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(b) pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Applicant engaged in a series of extramarital sexual encounters in which he explored BDSM with other consenting adults. He estimated that he had about 150 partners. His wife did not know about his conduct. AG ¶¶ 13(b), 13(c), and 13(d) are applicable. The SOR did not allege that the conduct was criminal, and the evidence did not establish that it was criminal. AG ¶ 13(a) is not applicable.

SOR ¶ 2.a alleges that Applicant “engaged in extramarital sexual encounters since about September 2019.” SOR ¶ 2.b alleges that Applicant’s “spouse is not aware of the full extent of [his] extramarital sexual encounters.” SOR ¶ 2.b does not allege any conduct that is not already alleged in SOR ¶ 2.a; and it does not raise any additional disqualifying conditions; it merely pleads an aggravating factor or a lack of mitigation. SOR ¶ 2.b is concluded for Applicant.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment; and

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant kept his extramarital sexual encounters secret. He told his wife about them at the same time he told her about his marijuana use. He also informed his family, people at work, and his church. He has not been involved in any extramarital activities since he told his wife. She attends therapy with him from a certified sex addiction therapist. He attended AA, NA, and SA meetings. He is actively involved with an online community of men who are in recovery, and he attends in-person meetings once a week. He embraced his faith, and he has turned to meditation and prayer instead of sex and marijuana.

Applicant’s sexual behavior no longer serves as a basis for coercion, exploitation, or duress; and it does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶¶ 14(b) and 14(c) are applicable.



## Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security clearance investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

SOR ¶ 3.a cross-alleges Applicant's marijuana use while granted access to classified information. As addressed under Guideline H, Applicant held a security clearance, but he did not have access to classified information. That language in the allegation is concluded for Applicant. SOR ¶ 3.b cross-alleges Applicant's extramarital sexual encounters. Applicant's marijuana use and extramarital sexual encounters reflect questionable judgment and created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. His marijuana use also reveals an unwillingness to comply with rules and regulations. AG ¶ 16(c) is applicable to the extramarital sexual encounters. AG ¶ 16(c) is not perfectly applicable to the marijuana use because that conduct is sufficient for an adverse determination under the drug involvement and substance misuse guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Personal conduct security concerns raised by Applicant's extramarital sexual encounters are mitigated under the same analysis addressed above under Guideline D. Personal conduct security concerns raised by Applicant's marijuana use are not mitigated under the same analysis addressed above under Guideline H.

### **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 relevant 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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines D, E, and H in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the security concerns under Guideline D, but he did not mitigate the security concerns under Guidelines E and H.

## 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
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For Applicant
Paragraph 2, Guideline D:	For Applicant
Subparagraphs 2.a-2.b:	For Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant (except for the language “while granted access to classified information,” which is found For Applicant)
Subparagraph 3.b:	For Applicant

## Conclusion

It is not clearly consistent with the national interest to continue Applicant’s eligibility for a security clearance. Eligibility for access to classified information is denied.

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Edward W. Loughran  
Administrative Judge